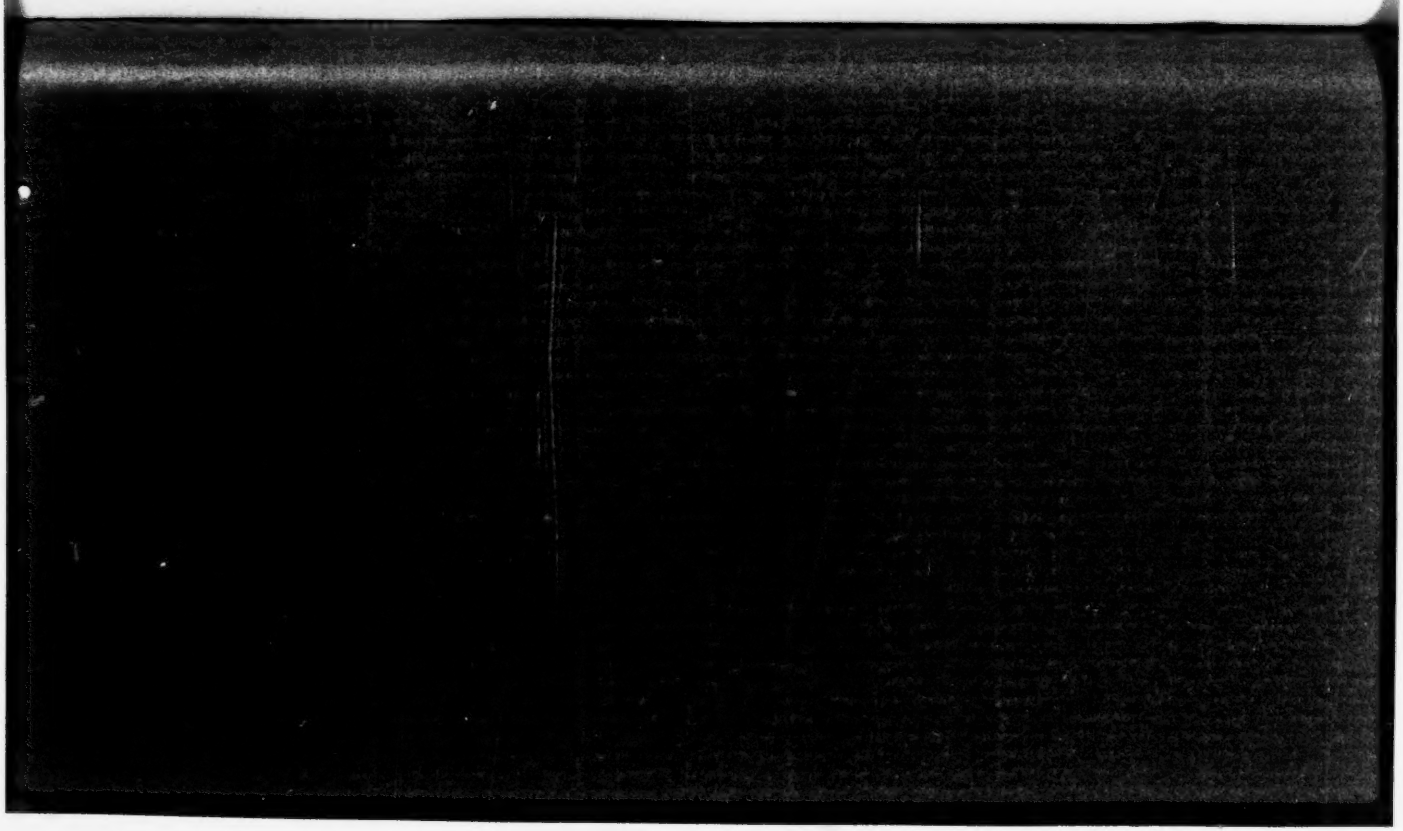

IN THE

SUPREME COURT OF THE UNITED STATES.

ON APPEAL FROM THE U. S. CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

STERLING R. HOLT,
JOEL A. BAKER,
THOMAS TAGGART,
GEORGE WOLF,
WILLIAM A. BELL, and
CHARLES H. STUCKMEYER,
Appellants,

vs.

THE INDIANA MANUFACTURING COMPANY,
Appellee.

No. 500.
October Term,
1897.

MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OF THE CASE.

Now comes the appellee in the above-entitled cause, by its solicitor, and moves this Honorable Court that this appeal be dismissed for want of jurisdiction of the case, for the reason that the appeal was not taken during the time prescibed by the statute within which appeals to this Court must be taken in such cases.

Respectfully submitted,

CHESTER BRADFORD,
Solicitor for Appellee.

HON. WM. A. KETCHAM,

Solicitor for Appellants.

Please take notice that on Monday, January 10th, 1898, I shall submit the foregoing motion to the Supreme Court of the United States, on the accompanying Brief.

Very respectfully,

CHESTER BRADFORD,

Solicitor for Appellee.

Service of the foregoing motion accepted, and receipt of a copy thereof, and of the accompanying brief supporting the same, acknowledged, at Indianapolis, Indiana, this 4th day of December, 1897.

W. A. KETCHAM,

Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

ON APPEAL FROM THE U. S. CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

STERLING R. HOLT, *et al.*, *Appellants,*
vs.
THE INDIANA MANUFACTURING COMPANY, *Appellee.*

No. 500.
October Term, 1897.

BRIEF FOR APPELLEE ON MOTION TO DISMISS.

May it please the Court:

The judgment and decree of the Circuit Court of the United States for the District of Indiana appealed from, was made and entered March 3, 1896, as appears on pages 16 and 17 of the printed transcript of record.

The appeal was prayed September 16, 1897, and the same was perfected, by the taking and approval of the appeal bond, September 30, 1897, as appears on pages 17 and 18 of the printed transcript of record. No steps were therefore taken in the matter

of said appeal until more than one year and six months after the date of the final decree in the Circuit Court.

The law respecting appeals of this character is found in the Act of March 3, 1891, generally known as the "Evarts Act", and those portions of said Act which are believed to have a bearing upon the present matter, read as follows:

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> . . . . . .
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> . . . . . .
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.
>
> . . . . . .
>
> SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.
>
> . . . . . .
>
> In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.
>
> But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the

order, judgment, or decree sought to be reviewed.

. . . . . .

SEC. 14. . . . And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

This Court undoubtedly has jurisdiction of the question involved in this case, but it is respectfully submitted that it has no jurisdiction of the present case itself, for the reason that the appeal was not taken within the statutory time.

Appellee is of the opinion that this Act of March 3, 1891, in and by the provisions above quoted, repeals and supersedes, at least in so far as it governs the time within which an appeal may be taken is concerned, Sec. 1008 Revised Statutes; and that, under the law as it now stands, no appeal can lawfully be taken to this Court, "unless within one year after the entry of the order, judgment, or decree sought to be reviewed".

It may be said, by way of argument, that it seems to have been the policy of Congress in passing the Act in question, to shorten the times within which appeals might be taken, and so speed the final disposition of litigation in Federal Courts. In the same Act the time for taking appeals to the Circuit Courts of Appeals is fixed at six months, whereas (under Sec. 635 R. S.) appeals from District Courts to Circuit Courts could formerly be taken within one year. It would therefore seem to have been the

intention to cut down the time within which appeals might be taken one-half in all cases—from two years to one year in cases appealable to the Supreme Court, and from one year to six months in cases appealable from the inferior to the intermediate Courts.

It may additionally be said that no reason can be seen why two years should be allowed for the taking of appeals to this Court from District and Circuit Courts, when only one year is allowed for the taking of appeals to this Court from the Circuit Courts of Appeals, which are the Courts of greater dignity and consequence. To give the law any other construction than that herein contended for, would therefore seem to involve an inconsistency, as well as a departure from what appellee believes to be its plain letter.

For the reasons above given, it is respectfully submitted that the present appeal ought to be dismissed.

CHESTER BRADFORD,
Counsel for Appellee.

INDIANAPOLIS, IND., Dec. 3, 1897.

IN THE

SUPREME COURT OF THE UNITED STATES.

On Appeal from the U. S. Circuit Court for the District of Indiana.

STERLING R. HOLT, *et al.*,
vs.
THE INDIANA MANUFACTURING COMPANY.

No. 500,
OCTOBER TERM,
1897.

REPLY TO APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

May it please the Court:

Last evening, (January 4, 1898,) I was furnished with a copy of what was then said to be appellants' brief in opposition to my motion to dismiss the appeal herein for want of jurisdiction of the case. I am now, late this evening, served with an additional and much more voluminous brief which I suppose is intended to withdraw and supersede the former one. It is impossible in the time at my command, to review this fully; but I will endeavor to so add to what I had said in reply to the first, as to constitute a short reply to what seems to be the salient points of the brief last served.

Upon my theory of the present proceeding, all that matter which relates to questions concerning the merits of the case is wholly immaterial, and will be disregarded. I am unable to see how the question of whether or not appellee was properly taxed can have any possible bearing upon the question of whether or not the appeal was taken in time. Nor, in my opinion, do appellants' help their case in its present aspect any by attempting to discredit the judgment and decree of the United States Circuit Court for the District of Indiana. A list of the kinds of cases appealable first to the Circut Court of Appeals and thence to this Court seems equally impertinent.

Coming to the discussion of the questions properly in issue here, I desire to reiterate and emphasize my belief that the whole act of March 3, 1891, from and including its title to the end thereof, is to be considered together, and all the sections and parts of sections relating to the question at issue are to be given their due and proper force and signification, and that the decision must turn, whether for or against my contention, not upon isolated words or short phrases, but upon the whole law so far as it relates to the question raised.

I insist that appellants' counsels' statement that if Sec. 1008 R. S. is repealed by this act "it is a repeal by implication" is incorrect; and that, therefore, the authorities cited to the effect that repeals by implication are not favored, are not applicable to the case at bar.

I insist that in and by Sec. 14 of the said act of March 3, 1891, all acts and parts of acts inconsistent with the provisions contained in Secs. 5 and 6 relating to appeals or writs of error, are expressly and in terms repealed. And Sec. 1008 R. S. which gives two years for an appeal to be taken to this Court, is inconsistent with the provisions of this act which reduce the time to one year.

Nor is there anything inconsistent (supposing that to be the rule) in allowing two years for an appeal from or writ of error to the Supreme Court of a State, where cases from such Courts are reviewable here. The matters which come from State Supreme Courts are usually matters of considerable magnitude, and frequently very complex; and they come much less frequently than cases from inferior Federal Courts. Possibly, also, State Court practitioners should be given more time within which to consider federal questions, than practitioners whose business is principally in the Federal Courts. It certainly involves no inconsistency if the practice be differently regulated. Whether it is or not, however, is not presented in the present proceeding; and I have no disposition to argue a question not now before the Court.

Proceeding now to a little more particular discussion of the questions raised: The title of the "Evarts" Act (Supplement to R. S., Chap. 517, p. 901) reads:

> An act to establish Circuit Courts of Appeals, and to *define and regulate in certain cases the* ***jurisdiction*** *of the Courts of the United States*, and *for other purposes.*

The act in question was ~~not~~, therefore, exclusively for the purpose of creating United States Circuit Courts of Appeals, but in a large measure was amendatory of the law respecting the jurisdiction of United States Courts generally, while its title is broad enough to cover these and many "other purposes".

In and by Sec. 5 it clearly defines in what cases this Court shall have jurisdiction of appeals direct from District Courts and Circuit Courts, as set out in my original brief.

Attention is also asked to the following Section not before quoted:

> Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts,
>
> But all appeals by writ of error [or] otherwise, from said district courts shall *only* be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, *as is hereinafter provided*, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had *only* in the Supreme Court of the United States or in the circuit courts of appeals hereby established *according to the provisions of this act* regulating the same.

Why should Congress have been particular to say *"according to the provisions of this act"*, if it

had been intended that appeals from Circuit Courts to this Court might be taken under the provisions of some other act, or statute?

And why, as appears in the quotation from Sec. 6 of said act in our original brief, should Congress say. "In **all** cases", etc., and "But **no** such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed", if it had been intended that appeals might in some cases be taken within two years?

It is believed that our theory of the policy of Congress in enacting this law is also strengthened by the provisions of Sec. 10, wherein it is provided that cases after review and determination in this Court shall take exactly the same course when they come from the Circuit Courts of Appeals as when they come from the District Courts or existing Circuit Courts.

In fact, the whole policy of the law seems to be to the effect that *all* appeals from lower Federal Courts to this Court should be taken in the same time, under the same rules, be determined in the same way, and disposed of in like manner;—and this seems right and reasonable.

Indeed, there can be no argument based upon reason why a litigant should be given two years within which to come to this Court from a Circuit or a District Court, when he is given only one year

within which to come from a Circuit Court of Appeals.

But, to repeat: The law says "In *all cases* not hereinbefore in this section made final". Not as appellants would seem to contend, "In *all cases in which appellate jurisdiction is primarily in the Circuit Court of Appeals*, and not hereinbefore in this section made final". And not "In *some cases* not herei before in this section made final".

And the law further reads "**no** such appeal"; not "no appeal from a circuit court of appeals", and not "some such appeals".

Indeed, the language used seems entirely plain and clear, and hardly needs definition.

Appellants' counsel call attention to Desty's Federal Procedure, Eighth Edition, Sec. 541, p. 879; and to Foster's Federal Practice, Second Edition, Sec. 483, pp. 1036–7.

Sec. 541 of DESTY is an *exact* reprint of Sec. 1008, p. 573, of the seventh (1889) edition of the same work, with the addition of a single authority, (*Chapman* v. *Barney*, 129 U. S 677), to the note; and this single added authority is a decision rendered in 1889. two years before the act in question was passed.

It is fair to say, therefore, that Mr. Desty shows no evidence in his work of having considered the question at issue.

FOSTER, (p, 1036), somewhat tentatively, says:

> It *seems* that this limitation applies only to writs of error to and appeals from the decisions of the Circuit Courts of Appeals.

He cites no authority, and indulges in no reasoning to support this position. Under these circumstances such a mere halting expression of opinion can not be considered of much force; and certainly it can not be contended that it should govern this Court in its disposition of the question.

It is respectfully submitted that appellant's assertion that the act in question:

> applies only to cases of appeal or writs of error to the Supreme Court from final decrees or judgments in the Circuit Court of Appeals;

is not supported by any proper interpretation of that act, or by sound reason.

The law in question, like others, should be construed as a whole.

So construed, we submit that it forms a complete and harmonious system in respect to the matters therein comprehended. Under the system thus established this appeal was not taken in time.

Sec. 14 of this act does not alone repeal Sec. 691 R. S. After doing this it proceeds:

> *And* ***all acts*** *and parts of acts* relating to appeals . . . . . *inconsistent with* the provisions for review by appeals . . . . . in the preceding *sections five and six of this act* ***are hereby repealed.***

Finally, this appeal is taken under the authority of the very act in question. Is it not more congruous

to hold that the time and the conditions are governed by the same act, than it is to strain language in order to have the time governed by an old law which it seems more consistent to say was superseded by the act in question?

Appellants seem to complain, and the tenor of the concluding portion of the brief is that they are ill used, because, as is expressed in their brief, after they have come to this Court, they are "met at the threshold with the objection that its [their] appeal is not timely".

In reply to this, I have only to say that I conceive that laws were enacted to be enforced; and if the construction which I think should be placed upon this law is the correct one, then the decision should be in our favor. It is no more a hardship to deprive the slow suitor of his appellate remedy than it is to deprive the slow creditor of the monetary relief to which he otherwise would be entitled. Indeed, not so much; for the presumption is in favor of the correctness of the findings of the lower Court. "The law favors the diligent". As I see it, appellee has been diligent and the appellants have not. If this is correct, why should they not take the consequences?

I will not consume the time of the Court in further replying to appellants' hint that they would like to be excused for their delay in taking this appeal, because they frittered away their time in abortive

appeal proceedings before a Court which had no jurisdiction of the subject. Appellants had numerous counsel (including the Attorney-General), and ample means: They are in no position to ask an advantage because of their own mistakes.

I trust your Honors will pardon such crudities of expression as appear herein, because of the needful great haste with which it has had to be prepared. But the question presented seems so clear to my mind that a very elaborate or highly finished presentation can, perhaps, be dispensed with.

It appears, over and over again, that it was in the mind of the legislators, in passing the act in question, to establish a *system* of appeals, not for Circuit Courts of Appeals alone, but for *all* United States Courts. If the act is in any sense ambiguous, which I do not think it is, the evident intention of the legislators should govern in construing it.

Respectfully submitted,

CHESTER BRADFORD,

Solicitor for Appellee.

INDIANAPOLIS, IND., January 5, 1898.

No. 30.

~~Brief of Bradford for Appell~~

IN THE

Supreme Court of the United States.

Filed Dec. 15, 1899.

On Appeal from the U. S. Circuit Court for the District of Indiana.

STERLING R. HOLT,
JOEL A. BAKER,
THOMAS TAGGART,
GEORGE WOLF,
WILLIAM A. BELL, and
CHARLES H. STUCKMEYER,
Appellants,

vs.

THE INDIANA MANUFACTURING COMPANY,
Appellee.

No. 30.
IN EQUITY.
October Term,
1899.

BRIEF FOR APPELLEE.

CHESTER BRADFORD,
For Appellee.
1233-1236 Stevenson Building,
Indianapolis, Indiana.

BRAIN, 16 S. DEL., INDPLS.

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IN THE

Supreme Court of the United States.

On Appeal from the U. S. Circuit Court for the District of Indiana.

STERLING R. HOLT,
JOEL A. BAKER,
THOMAS TAGGART,
GEORGE WOLF,
WILLIAM A. BELL, and
CHARLES H. STUCKMEYER,
Appellants, (Defendants below),
vs.
THE INDIANA MANUFACTURING COMPANY,
Appellee, (Complainant below).

No. 30.
IN EQUITY.
October Term,
1899.

BRIEF FOR APPELLEE.

May it Please the Court:

In bringing this suit, complainant, in its bill, in the clearest possible terms, waived oath to answer. Transcript, p. 8, fourth line.

By the amendment to the forty-first Equity Rule, adopted by this Court at its December Term in 1871, it was provided:

> If the complainant, in his bill, shall waive an answer under oath . . . the answer of the defendant, though under oath, .

> . . shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only.

Under this rule, therefore, the defendants' answer can not be made to take the place of evidence in their favor.

Defendants submitted no evidence whatever.

The matter is therefore to be heard and decided upon the pleadings, and evidence taken on behalf of appellee.

Issues are determined by the pleadings, and these issues can not be changed by argument, illustration, improper evidence, or inapplicable authorities.

Particular attention is therefore invited to the allegations of the bill and of the supplemental bill, and to the inadequacy of the answer to meet those allegations. Attention is further called to the affirmative character of most of the few allegations of the answer, and to the fact that no evidence was tendered in support thereof.

During the progress of this suit, at various stages, the defense has been in charge of four different counsel, each of whom has seemed to have widely divergent views concerning the proper basis of defense from any of the others.

Appellants' brief (a manuscript copy of which was only furnished appellee's counsel late on the afternoon of Wednesday, September 27) was prepared by the present Attorney-General during the preceding nine or ten months, prior to which time he had been furnished copies of appellee's counsel's former briefs. It may therefore be considered as but natural that many of the contentions heretofore made in the case should be abandoned upon this final presentation. The brief, however, to a very large extent, is based upon a complete shifting of position from any heretofore taken by the defendants-

appellants, and it seems somewhat late, in appellee's counsel's view, to here raise such matters for the first time. In the brief time at counsel's command, it seems impossible to adequately answer the matters thus raised, in detail, and counsel for appellee must therefore beg the indulgence of the Court if in his answer to much of appellants' brief he deals with the questions in what may be thought to be too general terms.

So much by way of prefatory remarks. We will now proceed to discuss the questions which we believe to be properly involved in the case before us.

STATEMENT OF THE CASE.

Appellants' counsel's apprehension of the matters involved in this suit appears so radically different from what appellee's counsel believes to be properly involved, that an independent statement of the case seems necessary.

This suit was brought under the ninth and sixteenth clauses of Sec. 629, Rev. Stat. U. S., defining the jurisdiction of the Circuit Courts of the United States, and which, respectively, provide that such Courts shall have jurisdiction "Of all suits at law or in equity arising under the patent or copyright laws of the United States," and of suits "to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States."

The latter clause was relied on, as it was not thought that any question could probably arise under the former, and in a sense this proved to be true. No questions were raised by either side presenting any issue under the laws usually called "patent laws" in the somewhat restricted sense in which that term is usually used. In a broader sense, the whole subject of United States pat-

ents being under federal law, it may well enough be considered that such laws are involved.

The inception of taxation in the State of Indiana is a tax return, or assessment list, or "schedule", which is made to or secured by the Township Assessor. All subsequent proceedings are (and must be) based largely, if not wholly, upon this return.

The acts of certain persons, the appellants herein, holding the offices of Assessor of Center Township, Marion County, Indiana; and of Assessor, Auditor and Treasurer, and the three last named of whom, together with two others, constitute the "Board of Review" of said County, are called in question in this proceeding, and also the *constitutionality* of certain statutes of the State of Indiana, under which the persons named pretended to be acting as such officers.

The bill of complaint alleges, in effect, that said persons, acting under the supposed authority of certain statutes of the State of Indiana, are attempting by virtue of their official position to tax certain "patent rights", or Letters Patent of the United States, owned by appellee.

The statutes of the State of Indiana respecting taxation are comprised in the Act of the General Assembly approved March 6, 1891, which, by Sec. 50, requires that:

> Every person required by this act to make or deliver such statement or schedule shall set forth an account of property held or owned by him, as follows:
>
> . . . . . .
>
> *Seventh.* All **PATENT RIGHTS** describing them, and giving the number of each patent, and the value of each.

In Sec. 53 of the same Act we find a form of "Schedule" prescribed, in which occurs this item:

"25 | Number of **PATENT RIGHTS** and value... | .. | ..."

The State of Indiana, therefore, in and by its statutes, attempts to tax "patent rights"; and thus

THE REAL QUESTION INVOLVED IN THIS CASE IS THE CONSTITUTIONALITY OF THESE PROVISIONS OF THE STATUTES IN QUESTION.

Plainly stated, appellee's contention is that

a State can have no control over a franchise granted by the government of the United States,

except such as may result from the exercise of that reasonable police power which is for "the protection of the lives, the health, and the property of the community". And that no other conditions or restrictions whatever can be imposed upon such a franchise, or the exercise thereof, except such as are prescribed by authority of the United States duly exercised in that behalf.

More briefly, that State Statutes prescribing the taxation of Letters Patent, are in conflict with the laws and paramount sovereignty of the United States, and are therefore **VOID.**

THE ISSUES, AS MADE BY THE PLEADINGS.

Before proceeding with the general discussion, it is, perhaps, of some importance to determine what the issues are, as made by the pleadings and applicable evidence, excluding hypotheses and suppositions.

The bill of complaint and supplemental bill in this case are quite elaborate, covering together about twelve printed pages of the record. Let us note for a moment the issues tendered thereby.

Recitals of the taxation are completely and particularly made. The proofs are identical with these allegations of the bill.

Allegations are made (transcript p. 3) that the assessor *demanded* the information respecting the Letters Patent owned by appellee, and that the demand was

submitted to. This was not a voluntary return. The testimony (Q. 66, p. 28), supports this allegation.

It is alleged (transcript, p. 5) "that the valuation placed upon its stock was because of the ownership of said Letters Patent and not otherwise". Appellee contends that this clearly appears in evidence.

The allegations is (transcript, p. 6) that the moneys are collected under the laws of the State of Indiana for the benefit of the State, of Marion County, and of the City of Indianapolis. Also irrecoverable. The proof (stipulation, transcript, p. 24) corresponds with the allegation.

The allegation is that the claims of taxation are made "under the provisions of the statutes of the State of Indiana", (transcript, p. 7, near top) and in and by the stipulation made before the closing of the case complainant gave notice that it would "produce and use at the hearing the statutes of the State of Indiana bearing upon the question of taxation of patents or patent-rights"; and in and by its brief it did produce and quote the pertinent portions of such statutes—and does the same here.

It is alleged that the wrongful taxation made a cloud upon the title of appellee's property which "a court of equity has full power and jurisdiction to remove by its decree". That has not been controvered. Can it be doubted?

It is alleged (p. 7) that appellee was engaged in the business of manufacturing, that its tangible property consisted of matters necessary thereto; that if such property should be seized and sold under the unlawful proceedings complained of "that its said business will be destroyed and ruined, and great and irreparable damage will result to your orator". Nothing to the contrary is alleged or shown.

It alleges (p. 8) that it could have "no adequate relief except in this court." It has never before been pretended that this was incorrect.

The prayer of the bill asked (p. 8) that it should be decreed "that the assessment and valuation for taxation of the Letters Patent of your orator made *directly* or ***indirectly*** by said assessor and Board of Review is inequitable, unjust, unlawful, and wholly void".

In and by the supplemental bill (p. 14) it is alleged:

> that whatever value the stock of said company might possess it possessed solely by reason and on account of its ownership of Letters Patent of the United States, and that except for such ownership such stock would have no value whatever, and that said stock was as a matter of fact all issued in payment for such Letters Patent and not otherwise, and that the stock of your orator except for the ownership of such Letters Patent would be utterly valueless.

The evidence corresponds exactly to this.

See "1895 Tax Statement" (transcript, p. 51), where, in answer to the question, "If no market value, then the actual value" it is said:

> The entire capital stock was issued in exchange for certain patent-rights or Letters Patent and has no value except such as it derives from such patent-rights. The tangible property of the corporation is not sufficient to meet its indebtedness.

See also the evidence quoted on pp. 34 and 35 *post* of this brief.

The foregoing, in short, are the contentions which appellants were called upon to meet.

Appellants' *answer* starts out by admitting the correctness of the allegations respecting taxation.

They then say "that the plaintiff is a corporation doing a lucrative manufacturing business, which is well established and widely known, with a large amount of

tangible property, and a *valuable franchise*, exclusive of patent rights."

It then asserts that the *value* of plaintiff's *stock* was a large sum.

The defendants then said that "the patents, if any plaintiff had, were in no way or manner included or considered and that the board in making said assessments considered only the legally taxable property and no other."

These are all the allegations contained in the answer, and most of these are either *affirmative* allegations, not responsive to any allegations of the bill, and which ought to be established by *independent proof* if at all, (Story's Eq. Pl. Sec. 849 *a.*), or are mere conclusions.

It is sufficient to say that the evidence does ***not*** show that plaintiff had "a large amount of tangible property" or "a valuable *franchise* exclusive of patent rights."

In the evidence, the value of the stock *varies with the opinions of the witnesses*, as it must necessarily do, being based upon "patent rights."

Appellants have submitted no evidence whatever to show that the patents "were in no way or manner included or considered" in making the assessments,—merely their *exparte*, unsupported and extra-judicial oaths to their answer—oaths not called for by the law or the practice where, as in this case, oath to answer is waived.

As to the remainder of the allegations of complainant's bill, the answer contains no reply whatever. In short, it is submitted, the answer but feebly responds to most of the material allegations of the bill, and by its silence as to many of them substantially confesses the truth of the same.

And, let it not be forgotten, *answer under oath having been waived*, that, under Equity Rule 41, the answer itself is not evidence for appellants.

FEDERAL FRANCHISES NOT TAXABLE.

"THE POWERS OF THE GENERAL GOVERNMENT, AND OF THE STATE, ALTHOUGH BOTH EXIST AND ARE EXERCISED WITHIN THE SAME TERRITORIAL LIMITS, ARE YET SEPARATE AND DISTINCT SOVEREIGNTIES, ACTING SEPARATELY AND INDEPENDENTLY OF EACH OTHER, WITHIN THEIR RESPECTIVE SPHERES."

So said Mr. Chief Justice TANEY in *Ableman* v. *Booth*, 21 How. 506. (16 L. Ed. 169).

Section 8 of Article I of the Constitution of the United States, enumerating the powers of Congress, includes that:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries.

In pursuance of the authority thus given, Congress has enacted laws under which Letters Patent for new inventions are granted to inventors or their assignees:—and that section pertinent to the present inquiry reads in part as follows:

> Sec. 4884. Every patent shall contain . . . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the *exclusive* right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof.

Quoting from the grant forming part of one patent so issued, we find that the form adopted agrees with the Constitution and the statute:

> Now therefore these LETTERS PATENT are to grant unto the said The Indiana Manufacturing Company, its successors or assigns for the term of seventeen years from the twenty-seventh day of March, one thousand eight hundred and ninety-four, the *exclusive* right to make, use and vend the said

> invention throughout the United States and Territories thereof.

It will be observed that the word used in the Constitution, in the Act of Congress, and in the Patent itself, is the word "EXCLUSIVE". A patent is a *franchise*,—an ***exclusive*** franchise,—to the inventor or his assignee. It is his to enjoy freely, and, like other franchises granted by the General Government, without any burdens or restrictions except such as are or may be imposed under the Constitution of the United States and laws of Congress made in pursuance thereof. Certainly such a franchise can not be subjected to the burdens of State or municipal taxation.

It is believed that this is the first case in a Federal Court in which the precise question of *whether or not Letters Patent are taxable* has been directly raised. But cases involving practically the same contention have frequently been before this Court, where *other* franchises granted by the General Government were attempted to be taxed; and counsel for appellee has not been able to find a single case at all supportive of the contention that such a franchise could be taxed. On the contrary the decisions are uniform in the other direction, and strongly and emphatically support our contention in this case.

In *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, (32 L. ed. 150) this Court in considering this question say:

> how can it be *possible* that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? . . . . Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us ***almost absurd*** to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates

from, and is a portion of, the power of the Government that confers it. To tax it is not only derogatory to the dignity, but *subversive of the powers*, of the Government, and *repugnant* to its paramount sovereignty.

In the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, (4 L. ed. 579) Mr Chief Justice MARSHALL in delivering the unanimous opinion of the Court said:

> If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatability of a right in one government to destroy what there is a right in another to preserve.
>
> . . . . . .
>
> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very

measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

. . . . . .

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may *tax* one instrument, employed by the government in the execution of its powers, they may tax *any and every other* instrument. They may tax the mail; they may tax the mint; ***they may tax patent-rights;*** they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

See also

Osborn v. *Bank*, 9 Wheat. 738. (6 L. ed. 204).

It is believed that the exact question involved and in the form here presented has not been passed upon by any Federal Court; but the case of *Commonwealth* v. *Edison Elec. Lt. Co.*, 157 Pa. St. Rep. 529, is believed to be absolutely on "all fours" with the present case, and clearly and conclusively decisive of the question. As the decision is short, I will quote it in full,—as follows:

GREEN, J. The fourth finding of fact by the learned Court below, which is fully sustained by the testimony, declares that "thirty-five thousand dollars in cash and three thousand shares of stock were issued and paid by the defendant company to the Edison Electric Light Company of New York for cer-

tain rights under its patents within the City of Philadelphia, and that without these rights the defendant could not carry on its business and furnish electric light to its customers." Also that "in consideration for said cash and stock paid to the Electric Light Company of New York, the defendant did not receive any tangible property whatever, but merely certain intangible rights or licenses under said Letters Patent." Also that "the defendant does not lease from any persons from whom said licenses were obtained any tangible property whatever, nor does it have in its possession any tangible property belonging to said persons."

This state of facts brings the case within the principle that ***capital stock invested in patents or patent rights is not taxable under State laws,*** as established by our decisions in the cases of

Commonwealth v. *Westinghouse Electric Co.*, 151 Pa. St. 265;

Commonwealth v. *Westinghouse Air Brake Co.*, 151 Pa. St. 276; and

Commonwealth v. *Philadelphia Co.*, 157 Pa. St. 527, in which the opinion has just been filed.

We are therefore of the opinion that the learned court below was right in its ruling.

Judgment affirmed.

It may be said that in the Pennsylvania cases only a *part* of the stock was issued for the patents, and was, therefore, non-taxable. Counsel for appellee is unable to observe the distinction. *All* the stock *which was issued for patents* was held not to be taxable, and there is no intimation in the decision that if *all* the stock had been so issued that any different rule as to the remainder of it would have been recognized. In the case at bar, in fact, and according to the testimony, every dollar of the stock was issued for the patents, and for nothing else.

This matter has also, since the present suit was begun in the Circuit Court for the District of Indiana, been

the subject of adjudication in the courts of the State of New York.

September 7, 1897, the Supreme Court, Appellate Division, Second Department, in the case of *People ex rel. Edison Electric Illuminating Co. of Brooklyn* v. *Board of Assessors of City of Brooklyn*, held that stock of a corporation issued for patent rights was not taxable. In that case it was said:

> The relator, an electric light company, by its return to the board of assessors, and the evidence of its officers given before that board, showed that its capital stock was $3,750,000, all of which had been paid in in money, except the sum of $945,000, which was paid for patent rights.

The whole capital stock had been assessed for taxation, including that "paid for patent rights."

The Court, after giving the particulars, further said:

> On a review of the proceedings of the board of assessors by *certiorari*, an order was made by the special term wholly vacating the assessment. From that order this appeal is taken.
>
> We think the order of the special term correct. It is true that the market value of the share stock of the relator was par or better. This may have justified the conclusion that, in a certain sense, the stock of the relator was not impaired; but it did not justify, *in the face of positive evidence to the contrary*, the assumption that the capital stock, even if unimpaired, was represented by assets or property which, under the law of this state, are subject to local assessment. The exclusive privilege or franchise, under *letters patent of the United States*, acquired by the relator for the sum of $945,000, and carried by it at that value, *was not subject to state or local taxation*.
>
> . . . . . .
>
> The order appealed from should be affirmed, with $10 costs and disbursements. All concur.

46 New York Supplement, 388.

An appeal was taken from the Supreme Court to the Court of Appeals, which on October 4, 1898, affirmed the decision of the Supreme Court, and, in the course of the opinion, said:

> The constitution of the United States (article 1, § 8, subd. 8) conferred upon congress the power to "promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In pursuance of this power, congress enacted that patents should be issued to inventors, which should secure to them for a limited term the "exclusive right to make, use and vend the invention or discovery through the United States and the territories thereof." Rev. St. U. S. § 4884. Patent rights are, therefore, granted under the federal constitution, and necessarily for the promotion of federal purposes. *Grant* v. *Raymond*, 6 Pet. 218, 241; *Ames* v. *Howard*, 1 Sumn. 482, Fed. Cas. No. 326; *Blanchard* v. *Sprague*, 3 Sumn. 535, Fed. Cas. No. 1,518.
>
> The federal purpose is primarily to stimulate genius, talent and enterprise by holding out that encouragement which patents give, but ultimately to secure to the whole community the great advantages that flow from the free communication of secret processes and machinery. The next step is that, *patent rights being created under the federal constitution and laws for a federal purpose, the States are without the right to interfere with them.* The right to tax a federal agency constitutes a right to interfere with, to obstruct, and even to destroy the agency itself, for, conceding the right of the state to tax at all, then it may tax to the point of destruction.
>
> . . . . . .
>
> The federal government having the right to create the agency, it necessarily has the right to protect it, not only from destruction, but from interference from any other government, whether such interference be in the guise of taxation, or otherwise,

> as the power to tax involves the power to destroy, and the power to destroy may render useless the power to create.
>
> . . . . . .
>
> The order should be affirmed. All concur. Order affirmed.
>
> 51 Northeastern Reporter, 269.

Especial attention is also called to the case *In re Sheffield et al.*, 64 Fed. Rep. 833. In this case the defendants, Sheffield and Edmunds, were arrested in a prosecution for selling patent rights without payment of a *license* ***tax*** prescribed by a statute of the State of Kentucky. The prisoners were taken before the United States Court at Louisville, on a writ of *habeas corpus*. Judge BARR discharged the petitioners, and, in the course of his opinion, made the following pertinent statements:

> Thus the question must be, can a State tax, or authorize a county or city to tax, a right—an incorporeal right—which is granted by the United States, and which, under the Constitution, can alone be granted by the United States? We think that question must be answered in the negative, under the principle settled in the case of *McCulloch* v. *State of Maryland*, 4 Wheat. 316, and the many subsequent cases.
>
> . . . . . .
>
> But ***the patent right itself***, *i. e.* the right to exclude all others from the manufacture, use, or sale of the invention or discovery, which is a grant by the United States, ***can not be taxed by a State.***
>
> . . . . . .
>
> We conclude the statute of Kentucky, under which the petitioners, Sheffield and Edmunds, are prosecuted and imprisoned, are *unconstitutional and void.*

It is very gratifying to counsel to find in a decision written since the greater portion of his brief was origin-

ally prepared such a literal and exact concurrence with his views.

Other authorities are referred to in the decisions above quoted from, and many others might be cited, but it seems to be unnecessary.

A PATENT IS A CONTRACT.

Section 10 of Article I of the Constitution of the United States denies to the States the power to impair the obligation of contracts.

A patent is a contract, existing between the inventor on the one hand, and the general public on the other; and is entered into under the Constitution and Laws of the United States. The consideration to the inventor is a temporary monopoly. The consideration to the public is the clear disclosure of the invention, and its free use when the monopoly—or patent—has expired.

Whitney v. *Emmett*, Baldw. 303; 1 Robb Pat. Cas. 567; Fed. Cas. No. 17,585.

Kendall et al. v. *Winsor*, 21 How. 322. (16 L. ed. 165.)

To permit states or municipalities to levy taxes upon these contracts would impair the obligations which have been entered into by the Government, on behalf of the people, with the inventor or his assignee.

Moreover "the power to tax involves the power to destroy."

McCulloch v. *Maryland*, *supra*.

It is impossible to suppose that even the "power" resides in a State to *destroy* a franchise granted by the General Government. States can impose no restriction whatever in respect to Letters Patent of the United States,—much less destroy them.

Castle v. *Hutchison*, 25 Fed. Rep. 394.

It is no new thing for the State of Indiana to attempt illegal forms of taxation. In 1873 it was attempted to

tax the gross receipts of transportation companies. In June, 1876, Judge DRUMMOND decided that law unconstitutional.

Indiana v. *American Express Co.*, 7 Biss. 227; Fed. Cas. No. 2,071.

WERE APPELLEE'S PATENTS TAXED.

Appellants' main argument, as counsel for appellee reads their brief, is based upon the contention that the appellants, in the acts complained of, did not assess the appellee's patents—thus apparently in effect conceding the correctness of appellee's position that Letters Patent are not taxable.

Appellants' counsel's argument will be reviewed briefly hereinafter.

The present question which will be discussed, is whether or not the taxing officers of Marion County, Indiana, did in fact in this case assess, either the Letters Patent (called in the Indiana Statutes "patent-rights") owned by appellee, or, what appellee contends is the same thing, the *stock* which was issued for and represents these patents, for taxation.

It may be premised that the taxing officers themselves thought they were taxing the patents directly until this controversy was begun. Before bringing this suit appellee's counsel took pains to inquire of the proper officer concerning the matter, and, in connection with securing certified copies of the tax papers, took the precaution to secure an official certificate stating the truth. This is the complainant's exhibit "Auditor's Certificate", and is printed on p. 47 of the printed record in this Court. The part of said certificate pertinent to the present question reads as follows:

> I further certify that the assessments for taxation for said years of the said The Indiana Manufacturing Company was based upon the said statements

and assessment lists and proceedings of which the above named exhibits are copies, *and that the item of patents was taken into consideration* in fixing the said assessments.

The evidence in the case is very brief. Indeed, the whole record amounts to but 64 printed pages. The oral evidence is found on pages 20 to 30 inclusive. The documentary evidence is introduced on pages 19 and 20 and is printed on pages 30 to 61 and stipulation pages 1 to 4, inclusive. This documentary evidence consists of certified or admitted copies of the "tax statements" and "assessment lists" secured from appellee by the tax assessor, and which must necessarily form the basis or starting point in the taxation of its property, and of the proceedings of the Board of Review when these assessment lists and tax statements came before them in due course.

Taking these up year by year, the following facts are disclosed:

1892. The auditor was unable to find the original "assessment list" for the year 1892 on file, but only the "statement" which is made by corporations; consequently no copy of said assessment list could be introduced. This "1892 Tax Statement" (pp. 31–33) shows that the capital stock was $200,000, and the market value thereof is stated as being 10 per cent. of the par value, or $20,000. "Personal property within the State" is returned at $5,000. No other facts appear by this statement.

The proceedings of the Board of Review for 1892 are set out on page 34 of the printed transcript, in which Mr. Sharpe says, in answer to questions, substantially the same thing that is shown in the "statement". Question No. 3 and the answer thereto read as follows:

Q. 3. What kind of business does this company do?

> A. Manufacturing straw stackers on an improved ***patent*** of the old Buchanan cyclone business. *It* is the means of stacking straw with wind; that is what we are doing. We blast the air, or throw it out through a chute. After we demonstrate it, *it* becomes a great deal more valuable. We felt we were putting *it* at a fair value at $20,000.

Now it is submitted that this answer clearly refers all the way through to the patent. He speaks first of "an improved *patent*" and then says "it"—referring evidently to the patent—"is the means of stacking straw with wind". The word "it" as used in this answer obviously refers to the patent. There is no evidence whatever that the other personal property was of any value beyond the $5,000 stated in the evidence. It follows that $15,000 of this assessment was upon the patent,—the "it". The amount of the assessment was exactly the alleged market value of complainant's stock.

The most pertinent evidence respecting these matters for the several years in question will be presently quoted.

See also complainant's exhibit "Auditor's Certificate" (pp. 30–31), which states, in terms, that the item of patents was taken into consideration in the years 1892 and 1893.

1893. For the year 1893 there is, in addition to the "statement" (pp. 34–36), made by corporations, a regular "assessment list" (pp. 37–41), the principal feature of which is a "schedule" of all the personal property held by The Indiana Manufacturing Company on the first day of April, 1893. Item 31 of this schedule reads as follows:

"31 | Number of patent rights and value.... | 4 | $25,000."

Various other items in this "assessment list" amounting to $8,900, bring the footing of the valuations in said "schedule" up to $33,900. The accompanying

"statement" shows the capital stock as being $360,000, all paid up, with none on the market, and the actual value estimated at $36,000, with an indebtedness of $25,000. The personal property returned amounts in the footing of the schedule to $33,900, and includes, of course, the $25,000 at which the patents were assessed. That is, the amount, $33,900, is exactly the same on both the schedule and the statement. There was no appearance before the Board of Review in 1893, and the Board on motion fixed the assessment at $36,000,—which was the amount returned as the *actual* ***value*** of its stock. In paying the taxes appellee has by way of abundant caution assumed that the valuation of its personal property was raised from $8,900 to $11,000, and has paid taxes on that amount, although it should justly have paid upon $8,900, as it had no more property; nor is there any evidence that it had, or that there was any undervaluation in the return made.

1894. For the year 1894 there is a similar "statement" (pp. 58-60), and a similar "assessment list" (pp. 46-50), as in 1893. Item 31 of the schedule in the assessment list is precisely the same as before, but the personal property owned by appellee at that time, other than the patents, amounted to only $7,645, the total footing of the "schedule" being $32,645. As before, the footing of the "schedule," and the item "Personal property within the State" on the "statement" agree, and are each $32,645, and it follows that the amount on the statement includes the item of $25,000 for patents.

The proceedings of the Board of Review for 1894 are set out on pages 1 to 4 inclusive, of the stipulation adding omitted matter to the record. In these proceedings there is erroneously included a colloquy between counsel and members of the Board; but this, as well as the whole proceedings, show clearly that the question of

patents was before the Board. And here develops for the first time the quibble by which the members of the Board of Review hoped to escape from the position that they are taxing the patents. This appears in the question by Mr. Taggart, (stipulation page 2), in which he substantially quotes the question on the "statement" by the corporation, showing that the *value of the stock* is $36,000 according to said statement. Now it was fully shown on the argument, and clearly appears by the evidence, that the stock was issued for nothing but the patents, and if the Board of Review, as appears by these proceedings, was attempting to assess the *capital stock*, they were simply assessing the patents under another name. That is, they were attempting to do indirectly what it was impossible for them to do directly. Argument on this proposition will be taken up separately.

And I would repeat that these entire proceedings show that the attempt of the Board of Review was to tax the capital stock, and not to tax the tangible property; and that this is a mere attempted evasion of the question at issue. It is shown abundantly that the *stock* represents the *patents*, and has *no value* except as it derives value from the patents.

This Court, in the case of *Handley* v. *Stutz*, 139 U. S. 417, although in another connection, said:

> The stock of a corporation is supposed to *stand in the place* of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property.

In this year the Board, as before, fixed the assessment at $36,000, notwithstanding the tangible property returned only amounted to $7,645. The tax receipt complainant's exhibit "1894 Tax Receipt, 1st Installment", (p. 45), introduced in evidence, shows that complainant paid on $11,000 instead of $7,645 as it equitably should

have done, thus paying on $3,355 value of property more than it actually had.

1895. In 1895, acting under instructions, the complainant refused to return its patents, and showed personal property to the amount of $10,137, both by its statement (pp. 51–53) and its assessment list (pp. 53–58). To the schedule is attached a slip signed by the chief deputy of the assessor, showing the returns of the patents in 1894. The assessment of $36,000 was adhered to by the taxing officers for this year. The proceedings of the Board of Review for 1895 are not in evidence, as the meeting of that body had not been held at the time the evidence was taken; but the supplemental bill, pages 13 to 15, inclusive, alleges that the Board of Review assessed appellee's property, as previously, at $36,000, and this is not denied or questioned.

Your Honors will notice that the transactions for the various years vary somewhat from each other, and are treated separately in the pleadings, those for each year being set out separately by means of one or more paragraphs in the bill and supplemental bill. It is believed, however, that there is no evidence anywhere indicating anything else than that the appellants either assessed appellee's patents directly, as appears by the "assessment lists", or assessed the *stock* of appellee, which it is shown was issued solely in payment for the patents, and thus is a mere representative of said patents.

What the assets of appellee were; the value of the same; what the stock was issued for, and the fact that the stock of the company during all this period would have had no value except for its ownership of the letters patent, is shown by the testimony of Mr. JOSEPH K. SHARPE, Jr., the company's Secretary and Treasurer, as follows:

1892. Q. 8. (p. 21.) Excluding patents, did the company at that time [1892] have assets which would amount in the aggregate to any greater sum than $5,000.00?

A. They did not.

Q. 14. State whether or not they [the patents] had any bearing upon the value of the stock?

A. The value of the stock was based entirely on the patents.

Q. 20. (p. 22.) What do you now say, according to your best recollection, was the indebtedness of The Indiana Manufacturing Company, April 1, 1892?

A. About $6,000.00.

Q. 21. And what do you say its assets were worth at that time, excluding patents?

A. About $5,000.00.

X-Q. 74. (p. 29.) What tangible property did the company have on the 1st day of April, 1892, and its value, if you know?

A. It would be impossible to state the value; but the property consisted of machinery, material and money in bank.

X-Q. 75. Have you any idea of the value of the tangible property on the 1st day of April, 1892?

A. My idea would be, that it was principally in machinery and material. Say about $2,000.00 machinery; $2,000.00 material; and $1,000.00 in cash. Now I might be entirely wrong about that.

1893. Q. 23. (p. 22.) At that time [1893] what were the assets of The Indiana Manufacturing Company, excluding the patents which were owned by it?

A. About $8,900.00.

Q. 24. What was its indebtedness at that time, if you know?

A. About $25,000.00.

X-Q. 76. (p. 29.) If the Indiana Manufacturing Company had any tangible property on the first day of April, 1893; please state what kind, and give its value?

A. It had stackers in process of manufacture, to the amount of $3,500.00; material, $2,000.00; machin-

ery, $2,000.00, and other property amounting in total to $8,900.00.

1894. Q. 26. (p. 22.) What were the assets of the company on April 1, 1894, excluding patents?

A. The property of the company was personal property entirely, and the value, exclusive of patents, was about $7,265.00.

Q. 27. (p. 23.) What was the indebtedness of the company on that date?

A. About $50,000.00.

X-Q. 77. (p. 29.) If the Indiana Manufacturing Company had any tangible property on the 1st day of April, 1894, please state the kind, and its value?

A. The character of the tangible property is identical with that of the previous year, and the amount about $7,200.00.

1895. Q. 29. (p. 23.) Please state the kind and value of the assets of the company on April 1, 1895?

A. The assets were personal property, and the value about $10,000.00, exclusive of patents.

Q. 30. What was the indebtedness of the company at that date?

A. About $50,000.00.

Generally. Q. 31. Please state what you know about the ability of the Indiana Manufacturing Company to pay its debts out of its tangible property and assets during all the time you have been connected with it, exclusive of any value that might be attached to patents owned by it?

A. Exclusive of patents, The Indiana Manufacturing Company has not been able to pay its debts from its other assets.

Q. 65. (p. 28.) Please state whether or not stock of The Indiana Manufacturing Company has any value except such as is derived from the possession of the patents you have spoken of?

A. The stock of The Indiana Manufacturing Company has no value except that derived from its Letters Patent. The fact of the case is that, except

through them, the company is hopelessly insolvent, and couldn't pay its debts by about $40,000.00.

X-Q. 80. (p. 30.) You say that your capital stock has no value except that derived from its Letters Patent?

A. I reaffirm that statement, and will say that our manufacturing business has no value except in developing our stacker, the profit of which comes from the fact only that we own the patents for same.

This is fully corroborated by the president, Mr. ARTHUR A. MCKAIN, who testified (p. 33) as follows:

Q. 57. (p. 26.) Do you know whether or not The Indiana Manufacturing Company has ever been possessed of tangible property or assets equal or exceeding its indebtedness?

A. I do.

Q. 58. (p. 27.) What is the fact?

A. The fact is that, aside from its patent rights, it has never at any time subsequent to February 1, 1892, had assets equal to its liabilities.

INCONSISTENCY OF PRESENT CONTENTIONS WITH APPELLANTS' DUTIES UNDER THE INDIANA STATUTES.

Appellee also contends that the Board of Review *must* under the Indiana Statutes have taken the "patent rights" directly into consideration in performing their duties. The statutes governing them have already been referred to, and the particular section under consideration is quoted at the bottom of page 4 of this brief. When these taxing officers allege that they did *not* take the patents into consideration, they ask the Court to believe that they *disobeyed* the law which created them and *refused to perform duties clearly laid down in the statutes of the State of Indiana which govern them.* They would have us believe that they are a tribunal to which constitutional questions are delegated for decision, and that they had declared the statutes of the State of

Indiana in this particular unconstitutional, and had proceeded to assess the property which they had decided to be constitutionally and lawfully assessable, and had omitted to assess certain other property, which the statute and statutory form requires them to assess.

Such an assumption needs only to be stated to show its untenability. Taxing officers must necessarily follow the statutes under which they act until such statutes are declared invalid or inoperative by competent authority. If they say they have not, that is tantamount to saying that all their acts are absolutely void, as being without authority of any kind. If they acted lawfully as the Board of Review of Marion County, then they acted *under* the statutes enacted for their guidance,—not in *defiance* of them. If they did not act under the statutes of the State of Indiana by which that board was established, and by which it must be governed, they were a mere assemblage of private citizens, without any authority whatever in the premises. That some or all of the provisions of these statutes may in proper proceedings be found to be unconstitutional and void, in no way avoids the duty of such officers as these to obey and act under them while they appear to be in force.

APPELLEE'S TAXES FULLY PAID.

As heretofore fully shown, appellee has paid not only its lawful taxes, but an amount in excess thereof. It did this out of abundance of caution, and for the purpose of relieving itself from any possible criticism in the matter. It is believed that, as a matter of fact, it would have had proper standing in Court if it had paid no taxes whatever. The proceedings of the Board of Review show that the assessment was inextricably confused and mixed together. It is unquestionably the duty of a complainant before beginning a proceeding of this kind to

pay all taxes which are justly and lawfully assessable, if the same can be ascertained; but where, without its fault, and solely by fault of the taxing officers, the legal and illegal taxes become so confused and mixed that the same can not be separated, then the taxee is relieved of all obligation. To make a tax legally collectable, it must be made in a definite and certain manner, so that the taxee can ascertain the exact amount which ought to be paid. If through no fault of its own, this is not done, then he is relieved of all obligation in the matter. It is not necessary to invoke this rule in the present case, but the matter is called to attention as showing the fairness and good faith with which appellee had proceeded from first to last.

VALUE OF CORPORATE STOCK IMMATERIAL.

The cross-examination of Mr. Sharpe by appellants' counsel, which is found in pp. 28 to 36, inclusive, of the printed transcript, is almost wholly about the value of the stock and the sales which had been made between individuals. It is submitted that this was not proper cross-examination at all, as nothing of the sort had been inquired about on the examination in chief.

We also contend, as elsewhere more fully stated, that the present value of the stock, and what it has sold for from one party to another, can have no possible bearing upon the questions at issue in this case. The corporation issued this stock to pay for certain Letters Patent of the United States; and it is therefore a *representative* of these Letters Patent; and when it passes from hand to hand, and money or other property is exchanged therefor, the taxables are neither increased nor diminished, but are merely transferred from one person to another, while that other person transfers to the first simply his interest in the patents represented by the stock. Such a

transfer does not affect the corporation in any way. The tangible property so transferred is still subject to taxation to the same extent it previously was. And the stock has not lost its representative character.

THAT WHICH CAN NOT BE DONE DIRECTLY CAN NOT BE DONE INDIRECTLY.

The attempt is made by appellants to make it appear that the taxation is not upon the patents owned by appellee, but upon its capital stock, and the contention is made that this is a different thing than to tax the Patents directly. This is a subterfuge. It is an attempt to vary the form without varying the substance. The bill and the evidence clearly shows that the corporation has no property, except the limited amount fully returned in the schedule and on which all taxes due have been fully paid, other than the patents in question: And that if the stock has any greater value than the tangible property, that value resides wholly in the "patent rights." An attempt, therefore, to levy a tax on any greater value than the tangible property which it owns, under the guise of taxing its capital stock, is *an attempt to do indirectly that which can not be done directly.*

Of course, as a matter of law this can not be done.

There is also good *reason*, as well as good law, against the doing of it in the present case. To illustrate: A has a patent. B has $100,000. The patent is not taxable. The $100,000 is taxable. B buys A's patent and pays him the $100,000 for it. *A* now has the $100,000 and it is taxable to *him*. B forms a corporation and puts in his $100,000 patent, taking stock therefor. There is yet but $100,000. It has *not* become $200,000 because a corporation has been formed and certificates of stock have been issued. The money has not been multiplied by the change of hands; neither B nor the corporation has it, or any tangible property to represent it, and, this

being so, neither of them can be taxed upon this value. But the taxing power has lost nothing. The $100,000 still exists, *in the hands of A*, and is still taxable at the *same rate* and to the *same extent* as originally. The patent, presumably, of course, has a value, but that value consists wholly in the franchise or monopoly which has been granted by the Government of the United States. The presumption may or may not be correct. If it should turn out *not* to be correct, then, under the theory of appellants, the purchasers would not only lose the $100,000 which they had paid for this supposedly valuable but really worthless thing, but would also be continually taxed because they had done so. If the presumption should be correct, however, this value would soon begin to manifest itself in the form of tangible property growing out of profits upon the business conducted under the franchise or monopoly, and this tangible property so resulting *would* be taxable, and in this way the patent—the privilege—the monopoly—the franchise—although not itself taxable, still is the means of producing taxables. These taxables so produced must represent the full actual value of the patent. It is impossible,—for the reason, among others, that its life is limited, (sometimes by adverse court decisions to a very short period)—that a patent should be worth any more than the money or other property that actually results from its use, which property as soon as produced enters into the body of taxables, and thus it contributes its full share to the support of the government. To tax it in any other manner, or to any greater extent, would be unreasonable and unjust, as well as unlawful.

When the corporation paid $100,000 for the patent, the officers doubtless thought or believed that they would make at least that much from it. Nevertheless, the corporation did not have one dollar of actual tangible value

in hand because of that belief. And to tax them upon that amount, as though they had the money in hand, is an absurdity, as well as illegal. If *beliefs* are to be taxed, why not tax him whose mental processes have been disturbed, and whose hallucination, in strange contrast to his surroundings, is that he is worth $1,000,000, upon that amount.

I repeat: A patent is not tangible property, or taxable; its value cannot be determined in advance; and it is or may be valuable, or not, as it is, or is not, profitably operated. Furthermore, if a patent proves profitable in operation the proceeds are taxed the same as other property, and bear their full share of the public burdens. And again, the actual value of a patent cannot exceed the amount which is realized from its exploitation during its lifetime. In and of itself it has and can have no value whatever. Any valuation of it is mere guess work—bald speculation.

It seems hardly necessary to cite authorities for the proposition that that which can not be done directly can not be done indirectly. If any doubt on this subject should exist, it is believed that the following cases are controlling of the question:

In the "license cases," 5 How. 504, (12 L. ed. 256), Mr. Chief Justice TANEY, in discussing the power of taxation by a State of imports, said:

> It can not be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it can not be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

In *Brown* v. *Maryland*, 12 Wheat. 419, (6 L. ed. 678), the Court said:

> But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves that this is varying the form, without varying the substance. . . . All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In *Crandall* v. *Nevada*, 6 Wall. 35, (18 L. ed. 745), it is said:

> It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.
>
> If the act were much more skillfully drawn, to sustain this hypothesis, than it is, we should be very reluctant to admit that any form of words which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised.

In *Philadelphia & Reading R. R. Co.* v. *Pennsylvania*, 15 Wall. 232, (21 L. ed. 146), it is said:

> It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, ... It was to guard against the possibility of such . . . embarrassments, no

> doubt, that the power . . . was conferred upon the federal government.

Still appellants persist in their contention. I will illustrate their position by an anecdote:

> A patient in an insane asylum imagined himself dead. Nothing could drive this delusion out of the man's brain. One day his physician had a happy thought and said to him:
>
> "Did you ever see a dead man bleed?"
>
> "No," he replied.
>
> "Did you ever hear of a dead man bleeding?"
>
> "No."
>
> "Do you believe that a dead man can bleed?"
>
> "No."
>
> "Well, if you will permit me, I will try an experiment with you and see if you bleed or not." The patient gave his consent, the doctor whipped out his scalpel and drew a little blood. "There," he said, "you see that you bleed; that proves that you are not dead."
>
> "Not at all," the patient instantly replied, "that only proves that dead men can bleed."

So in this case: I ask them if they ever *knew*, especially in a court of equity, of anything being permitted to be done indirectly that could not be done directly? If they ever *heard* of its being done? If they *believe* it can be done? And the answer must in each case be, *No.* It seems to be conceded on all hands that a federal franchise can not be taxed. I puncture their argument, and show that the pretense of taxing the *stock* of appellee is a pretense merely; for the stock clearly has no value except such as results from the ownership of these patents; and I say, as you can not do indirectly what you can not do directly, that proves that you can not so tax my client. But they reply "Oh! no, that only proves that we *can* do indirectly what we can not do directly. By the hocus-pocus of placing the valuation upon the stock— a mere

representative of property—instead of upon the property itself, which property is not taxable, we are enabled to *evade* the law, and, notwithstanding that you are right and we are wrong, accomplish our purpose." Do the gentlemen seriously think a court of equity will lend itself to such double dealing and subterfuges as are involved in this proposition?

WHAT THE STOCK WAS ISSUED FOR.

The testimony hereinbefore quoted shows that it is utterly impossible that the stock should have had any value except such as is derived from the Letters Patent which it owns. In addition to this there is direct testimony showing that the entire capital stock of this corporation was *actually issued* for these "patent rights", or Letters Patent, and for nothing else. The capital stock was originally $200,000, and was afterwards increased to $360,000.

Mr. ARTHUR A. MCKAIN, who has been the president of the company continuously ever since its organization, testifies (pp. 25-27) respecting this matter as follows:

> Q. 44. What was the original capital stock of The Indiana Manufacturing Company?
>
> A. $200,000.00.
>
> Q. 45. For what consideration was that stock issued.
>
> A. It was issued to me in consideration of my assignment to the company of certain Letters Patent.
>
> Q. 46. State whether or not the company received anything else except Letters Patent for said stock.
>
> A. It did not.
>
> Q. 54. Was the capital stock of The Indiana Manufacturing Company ever increased or diminished, and if so, in what amount?
>
> A. It was increased by the issue of $160,000.00 additional.

Q. 55. For what purpose was this increase of stock made?

A. To acquire the rights in certain United States patents owned by the Farmer's Friend Stacker Company.

Q. 56. What consideration, as a matter of fact, did The Indiana Manufacturiug Company receive in exchange for this $160,000.00 of increased capital stock?

A. Nothing but those rights in patents.

Mr. JAMES P. BAKER, who was at first the Secretary of the company, testifies, in respect to the original $200,000 of stock, (p. 27) that

> the consideration for the stock was for the interest Mr. McKain held in these patents.

Mr. JOSEPH K. SHARPE, Jr., who succeeded Mr. Baker, testifies, (p. 23) as to the additional stock issued, as follows:

> Q. 34. What, as a matter of fact, was the additional stock of $160,000.00 issued for; or in other words, what consideration did the company receive for it?
>
> A. The interest of The Farmer's Friend Stacker Company in certain patents pertaining to straw stackers.

All the assessment lists show that a large part of the personal property returned consisted of "patent rights".

The "1894 Proceedings, Board of Review" (stipulation pp. 1–4) also discloses this fact clearly.

The "1895 Tax Statement" states in answer to the question (p. 51) as to the actual value of the stock:

> The entire capital stock was issued in exchange for certain patent rights or Letters Patent and has no value except such as it derives from such patent rights. The tangible property of the corporation is not sufficient to meet its indebtedness.

How can it be said, in the face of all this evidence, that the capital stock of this corporation represents anything but the Letters Patent owned by the corporation? And how can it be said that a tax upon such stock is not an indirect tax upon the patents? Unless, indeed, it should be held that the transaction was so direct as not to merit the title of "indirect."

APPELLEE'S POSITION DISTINGUISHED.

I wish to distinguish clearly and emphatically between appellee's contention in this case—that the State has no power by taxation or otherwise to interfere with the enjoyment—the free unrestricted enjoyment—of the incorporeal right secured to it by its Letters Patent, —and that other but wholly erroneous position, with which it has sometimes been confounded, which would deprive the State of control of tangible property within its borders simply because it might happen to be the subject of a patent, or the power of police regulation. On the contrary I desire to say that in my opinion the State has precisely the same right to tax a patented *machine* that it has to tax an unpatented machine. That it has the same right to establish police regulations regarding the use of a patented invention, that it has to establish police regulations regarding the use of a similar or corresponding unpatented invention. This is a wholly different thing from interfering with or laying burdens upon, the patent itself—the incorporeal right—which has been granted under the Constitution and laws of the United States; and which—by the very phraseology of the Constitution itself, and of the law itself, and of the patent itself,—is made an *exclusive* right; no more to be invaded or interfered with by a state than by an individual.

The real rights of States in the matter have been defined by the Supreme Court in the cases of

Patterson v. *Kentucky*, 97 U. S. 501. (24 L. ed. 1115).
Webber v. *Virginia*, 103 U. S. 344. (26 L. ed. 265).

In the latter case the following language is used:

> It is only the right to the invention or discovery, ***the incorporeal right***, WHICH THE STATE CAN NOT INTERFERE WITH.

Various courts at various times have declared with more or less emphasis against interference under color of authority of State laws with rights secured by Letters Patent of the United States. These questions have arisen in different ways, but the spirit of the great bulk of decisions bearing in any way upon the question is the same. Among the cases in which questions of this character have been considered are the following:

Read et al. v. *Miller et al.*, 2 Biss. 12; Fed. C. 11,610.
Robinson, ex parte, 2 Biss. 309; Fed. Cas. 11,932.
Holliday et al. v. *Hunt*, 70 Ill. 109.
Crittenden v. *White*, 23 Minn. 24.
Helm v. *First Nat. Bk.*, 43 Ind. 167.
Woollen v. *Banker*, 2 Flip. 33; 17 Alb. L. J. 72; Fed. Cas. No. 18,030.
Cranson v. *Smith*, 37 Mich. 309.
May v. *Palls County*, 31 Fed. Rep. 473.
Gamewell Fire Alarm Tel. Co. v. *New York*, 31 Fed. Rep. 312.
Castle v. *Hutchinson*, 25 Fed. Rep. 394.

Counsel is well aware that the Supreme Court of Indiana has said that decisions of this character were overruled by *Patterson* v. *Kentucky*, *supra*, but if they are carefully examined it will be seen that the questions involved in the last-named case had no relation whatever to those involved in the cases above cited. *Grover & Baker S. M. Co.* v. *Butler*, 53 Ind. 454, was undoubtedly substantially overruled in the *Patterson* v. *Kentucky* case; but that case differed widely from the others referred to; and it is strange how the Supreme Court of Indiana

could have ever fallen into the manifest and undoubted error it did in that case, ostensibly on the authority of the other cases; and it is equally strange how it could have afterwards so misinterpreted the decision in the case of *Patterson* v. *Kentucky*.

The police power of the State is unquestionable. It certainly is not questioned here, any more than is the right to tax tangible property, whether the same be patented or not. Patterson had no more right to sell his dangerous illuminating oil in violation of the Kentucky law, because he had a patent on it, than my brother Taylor would have, if he had a patent on a gun, to shoot an unoffending citizen with it in violation of the Indiana law against murder. When he came to be tried for murder, the plea that he owned a patent, if made, would justly be treated as ridiculous; and if, perchance, the verdict should be that he be hanged therefor, the United States would not interfere. But he might own his patent so long as he pleased, and his free use and enjoyment of it could not be interfered with,—or taxed. Should he engage in the manufacture of fire arms, his manufacturing plant and the product thereof would be subject to taxation. If he engaged in the manufacture of ammunition, he must comply with local laws and regulations regarding the handling of explosive substances. But the patent or patents which he might own—the incorporeal rights—they are his. They can neither be taken away or rendered subject to taxation or other local interference. These grants are from the sovereign power, and—directly or indirectly—in and of themselves, they are subject to no manner of State or local regulation. They can be acquired, transferred, used, bought, sold and enjoyed, in absolute and unrestricted freedom.

FURTHER ILLUSTRATIONS AND AUTHORITIES.

It seems almost a work of supererogation to continue this argument further. Nevertheless, a few illustrations may not be inapt:

Greenbacks—money—until recently when Congress gave the right,—was not taxable, because issued by the Government of the United States.

Bank v. *Supervisors*, 7 Wall. 26. (19 L. ed. 60.)
The Banks v. *The Mayor*, 7 Wall. 16. (19 L. ed. 57.)
Ogden v. *Walker*, 59 Ind. 462.

Even the salaries of officers of the Government of the United States can not be taxed by a State.

Dobbins v. *Commissioners Erie Co.*, 16 Pet. 435. (10 L. ed. 1022.)

The general power of a State to tax does not extend to agencies of the General Government.

State v. *Garton*, 32 Ind. 1.
W. U. Tel. Co. v. *Richmond*, 26 Gratt. (Va.) 1.

When legal part of taxes has been fully paid, illegal remainder can be enjoined.

Tallasee Mfg. Co. v. *Spigener*, 49 Ala. 262.

As to the right to maintain a suit in equity, and to secure an injunction, where a part of the taxes in controversy would be paid to the state and thus become irrecoverable if paid, see

Foote v. *Linck*, 5 McLean 616; Fed. Cas. No. 4,913.

See also

First Nat'l Bank of Omaha v. *County of Douglas et al.*, 3 Dillon 298; Fed. Cas. 4,809.

In which are distinct and careful rulings on the questions, by Mr. Justice MILLER.

See also

37 Wis. 75; 42 Wis. 502; 43 Wis. 48;
43 Wis. 55, and 45 Wis. 519.

A number of authorities bearing upon the question involved in this case are collected and discussed in the opinion of Mr. Justice MATTHEWS in

Pullman Southern Car Co. v. *Nolan*, 22 Fed. Rep. 276.

Injunction will lie to restrain the collection of a tax on personal property, where the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is illegal, or where there is no means of recovering back from the State taxes illegally assessed.

City Nat'l Bank v. *Paducah*, Fed. Cas. No. 2,743.
First Nat'l Bank v. *County of Douglas*, *supra*.

It is a general and well recognized rule that an injunction will lie against the collection of a tax upon property which is exempted by law from taxation. The case is, at least, as strong, where to levy a tax would be an infringement of rights clearly derived from federal laws, as where there is an express statutory exemption. In other words, it is no less an exemption by law when the condition is clearly deducible from existing constitution and laws, than when there is a particular act exempting the property by set phrase.

WAS THE APPEAL TAKEN IN TIME.

In this case we seem also to be confronted with the question of whether or not the appeal is a proper and lawful one.

This question was attempted to be raised by a motion to dismiss, which the Court denied; without, however, filing any opinion. But, as counsel is informed that the Court sometimes considers it best to postpone the consideration of such questions until the hearing, and therefore denies such motions previously made the question is now again raised for such consideration as the Court may see fit to give it.

The judgment and decree of the Circuit Court of the United States for the District of Indiana appealed from, was made and entered March 3, 1896, as appears on pages 16 and 17 of the printed transcript of record.

The appeal was prayed September 16, 1897, and the same was perfected, by the taking and approval of the appeal bond, September 30, 1897, as appears on pages 17 and 18 of the printed transcript of record. No steps were therefore taken in the matter of said appeal until more than one year and six months after the date of the final decree in the Circuit Court.

The law respecting appeals of this character is found in the Act of March 3, 1891, generally known as the "Evarts Act", (Supplement to R. S., Chap. 517, p. 901) and the title, and those portions of said Act which are believed to have a bearing upon the present matter, read as follows:

AN ACT to establish Circuit Courts of Appeals, and to *define and regulate in certain cases the* ***jurisdiction*** *of the Courts of the United States*, and *for other purposes.*

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts.

But all appeals by writ of error [or] otherwise, from said district courts shall *only* be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, *as is hereinafter provided*, and the review, by appeal, writ of error, or otherwise, from the existing circuit courts shall be had *only* in the Supreme Court of the United States or in the circuit court of appeals hereby established *according to the provision of this act* regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

. . . . . .

In any case that involves the construction or application of the Constitution of the United States.

. . . . . .

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

. . . . . .

SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.

. . . . . .

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

. . . . . .

SEC. 14. . . . . And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

This Court undoubtedly has jurisdiction of the *question* involved in this case, but it is respectfully submitted that it has no authority to hear and determine the *case* itself, for the reason that the appeal was not taken within the statutory time.

Appellee is of the opinion that this Act of March 3, 1891, in and by the provisions above quoted, repeals and supersedes, at least in so far as it governs the time within which an appeal may be taken is concerned, Sec. 1008 Revised Statutes; and that, under the law as it now stands, no appeal can lawfully be taken to this Court, "unless within one year after the entry of the order, judgment, or decree sought to be reviewed".

It may be said, by way of argument, that it seems to have been the policy of Congress in passing the Act in question, to shorten the time within which appeals might be taken, and so speed the final disposition of litigation in Federal Courts. In the same Act the time for taking appeals to the Circuit Courts of Appeals is fixed at six months, whereas (under Sec. 635 R. S.) appeals from District Courts to Circuit Courts could formerly be taken within one year. It would therefore seem to have been the intention to cut down the time within which appeals might be taken one-half in all cases—from two years to one year in cases appealable to the Supreme Court, and from one year to six months in cases appealable from the inferior to the intermediate Courts.

It may additionally be said that no reason can be seen why two years should be allowed for the taking of appeals to this Court from District and Circuit Courts, when only one year is allowed for the taking of appeals to this Court from the Circuit Courts of Appeals, which are the Courts of greater dignity and consequence. To give the law any other construction than that herein contended for, would therefore seem to involve an inconsis-

tency, as well as a departure from what appellee believes to be its plain letter.

The whole Act of March 3, 1891, from and including its title to the end thereof, should, it seems, be considered together, and all the sections and parts of sections relating to the question at issue be given their due and proper force and signification, so that the decision should turn, not upon isolated words or short phrases, but upon the whole law so far as it relates to the question raised.

Sec. 1008 R. S. is repealed by this Act,—not "by implication", but by the express language thereof.

By Sec. 14 all Acts and parts of Acts inconsistent with the provisions contained in Secs. 5 and 6 relating to appeals or writs of error, are *expressly* and *in terms* repealed. And Sec. 1008 R. S. which gives two years for an appeal to be taken to this Court, seems clearly inconsistent with the provisions of this Act which reduce the time to one year.

Nor is there anything inconsistent (supposing that to be the rule which is by no means clear, but which it is not necessary to here discuss) in allowing two years for an appeal from or writ of error to the Supreme Court of a State, where cases from such Courts are reviewable here. The matters which come from State Supreme Courts are usually matters of considerable magnitude, and frequently very complex; and they come much less frequently than cases from inferior Federal Courts. Possibly, also, State Court practitioners should be given more time within which to consider federal questions, than practitioners whose business is principally in the Federal Courts. It certainly involves no inconsistency if the practice be differently regulated. Whether it is or not, however, does not seem to be presented in the present proceeding.

Proceeding now to a little more particular discussion of the questions raised: The Act in question clearly was not exclusively for the purpose of creating United States Circuit Courts of Appeals, but in a large measure was amendatory of the law respecting the *jurisdiction* of United States Courts generally, while its title is broad enough to cover these and many "other purposes".

First, it may be asked, why should Congress have been particular to say "according to the provisions of *this* Act," if it had been intended that appeals from Circuit Courts to this Court might be taken under the provisions of some other act or statute?

And why, as appears in the quotation from Sec. 6 of said act, should Congress say: "In ***all*** cases", etc., and "But ***no*** such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed", if it had been intended that appeals might in *some* cases be taken within two years?

It is believed that appellee's theory of the policy of Congress in enacting this law is also strengthened by the provisions of Sec. 10, wherein it is provided that cases after review and determination in this Court shall take exactly the same course when they come from the Circuit Courts of Appeals as when they come from the District Courts or existing Circuit Courts.

In fact, the whole policy of the law seems to be to the effect that *all* appeals from lower Federal Courts to this Court should be taken in the same time, under the same rules, be determined in the same way, and disposed of in like manner;—and this seems right and reasonable.

Indeed, there can be no argument based upon reason why a litigant should be given two years within which to come to this Court from a Circuit or a District Court,

when he is given only one year within which to come from a Circuit Court of Appeals.

But, to repeat: The law says "In *all cases* not hereinbefore in this section made final". Not as appellants would seem to contend, "In *all cases in which appellate jurisdiction is primarily in the Circuit Court of Appeals*, and not hereinbefore in this section made final". And not "In *some cases* not hereinbefore in this section made final".

And the law further reads "***no*** such appeal"; not "no appeal from a Circuit Court of Appeals", and not "some such appeals".

Indeed, the language used seems entirely plain and clear, and hardly needs definition.

The law in question, like others, should be construed as a whole.

So construed, we submit that it forms a complete and harmonious system in respect to the matters therein comprehended. Under the system thus established this appeal seems not to have been taken in time.

Sec. 14 of this act does not alone repeal Sec. 691 R. S. After doing this it proceeds:

> *And* ***all acts*** *and parts of acts* relating to appeals . . . . . *inconsistent with* the provisions for review by appeals . . . . . in the preceding *sections five and six of this act* ***are hereby repealed.***

Finally, *this appeal is taken under the authority of the very act in question.* Is it not more congruous to hold that the time and the conditions are governed by the *same* act, than it is to strain language in order to have the time governed by an old law which it seems more consistent to say was superseded by the act in question?

Appellants suggest that they used some of their time in an appeal to the Circuit Court of Appeals, and

for this reason should be excused for their delay. That they frittered away their time in abortive appeal proceedings before a Court which had no jurisdiction of the subject seems scarcely an excuse. They are under no legal-disabilities, while they had numerous counsel (including the Attorney-General), and ample means: They are in no position to ask an advantage because of their own mistakes.

The question presented seems quite clear and simple, and a very elaborate or highly finished presentation can, perhaps, be dispensed with.

It appears, over and over again, that it was in the mind of the legislators, in passing the act in question, to establish a *system* of appeals, not for Circuit Courts of Appeals alone, but for *all* United States Courts, If the act is thought to be in any sense ambiguous, it would seem that the evident intention of the legislators should govern in construing it.

SUMMARY.

Our positions briefly stated, are—

1. That a patent *can not* be taxed by a State:

a. Because it is a federal franchise not subject to State authority.

b. Because to do so would impair a contract. Further, a contract to which the United States is a party.

2. That a patent *ought not* to be taxed, because:

a. It has no ascertainable actual value.

b. It expires in a limited time; after which—actually and potentially—its value is at an end.

c. Meantime its entire value has been measured by its earnings, and has gone into and become a part of the mass of ordinary property, which is taxable, and presumably is taxed.

3. That the capital stock of a corporation issued for and representing a patent is to all intents and purposes the same thing as the patent itself.

4. That to tax such stock would be the same thing as taxing the patents for which it was issued.

5. That the statutes of the State of Indiana requiring the taxation of "patent rights" contravene federal law, and are therefore void.

6. That the acts of appellants complained of, being based upon a void law, are also void and without force or authority.

7. The appeal was not taken in time.

REPLY TO APPELLANTS' BRIEF.

THE PLEADINGS.

It seems unnecessary to review appellants' long recitals upon "the pleadings". These pleadings appear on pp. 2–15 of the printed transcript, and show for themselves. Such recitals therefore seem unnecessary in a brief, as they must either be substantially identical with the pleadings or else embody inaccuracies. One such inaccuracy is noticed under the sub-head "Decree", where it is somewhat erroneously stated that the appeal was dismissed "for the reason that this was not a suit to prevent taxation arising under the patent laws of the United States". The real reason for the dismissal, in the language of the Court of Appeals, is:

> We are constrained to the conclusion that this court has *no jurisdiction* of an appeal from that decree, and that the proper and only remedy of the appellants is by appeal to the Supreme Court of the United States.
>
> 80 Fed. Rep. 1,—at p. 4.

We have already, in our main brief, called attention to the inadequacy of defendants' answer. Also to the futility of the verification of the same because of the provisions of Equity Rule 41, answer under oath having been expressly waived by the bill.

THE QUESTIONS OF FACT AT ISSUE.

That there may be no misapprehension, we desire to state distinctly at the outset, that there are two or three propositions in the nature of questions of fact upon which appellants and appellee distinctly differ.

Appellee's position upon these facts may be stated as follows:

(1). On p. 17 of their brief, appellants' counsel say "This is essentially a case of *excessive* taxation".

With this statement we take distinct issue. We say it is a case where the taxation is *wholly void*, because it contravenes federal law. *The tax complained of is all wrong or all right.* If patents are taxable, we make no complaint concerning the valuation.

(2). We are told (appellants' brief pp. 22-49) that we should have pursued certain remedies under various State laws which are called to our attention.

We say that under the circumstances, federal questions being distinctly presented, we did not need to pursue the remedies prescribed by the State laws. It is a familiar and abundantly well settled proposition that where there is a distinct federal question arising under the Constitution and laws of the United States that parties may apply to the federal courts without calling upon the State courts to intervene. Whether or not there was a procedure open to us in the State courts is therefore immaterial. There is no reason why we should pursue administrative appeals or any other of the various remedies provided for by State statutes in cases of wrongful taxation where questions under State laws arise and are to be considered.

It will be noticed that in the colloquy between appellee's counsel and Mr. Holt, of the Board of Review, to which appellants' counsel has called attention, (appellants' brief, p. 32), it was stated that because it was a federal question we should resort to the federal courts to have it determined.

(3). Appellants' brief (*e. g.* p. 108) proceeds upon the theory that our contention is that only tangible property can be assessed to a corporation. This is incorrect. Our proposition simply is that *we had no other than tangible property which was properly assess-*

able, and that upon this we have paid all that—and more than—was due; that the property upon which the assessment complained of was made is not taxable at all. We have, of course, called it by its proper name—intangible property—but we have *not* said that had the company possessed *other* intangible property it would not have been taxable. No such question has arisen in this case, and it is not necessary to discuss what other intangible property might have been taxable, or what not taxable, if the company had owned any such. As a matter of fact, its only intangible property consists of its Letters Patent, and this case deals solely with the question of whether or not *such* intangible property is taxable, and not at all with whether *all* intangible property is or is not taxable.

It follows from the above that all of appellants' authorities bearing upon the question of *valuation* of property, tangible or intangible, have no application to this case. We are not questioning valuations. We are raising the question of whether or not these taxing officers had the right to assess this particular property at all.

Let us reiterate, therefore: We have nothing to do with these questions of "valuation", or whether or not the tax complained of was an "excessive" tax.

WAS THERE A PLAIN, SIMPLE AND ADEQUATE REMEDY AT LAW.

Let us examine for a moment the remedies suggested by appellants' brief, (pp. 22-49), and see whether or not they are such plain, simple, complete and adequate remedies as would in any event prevent the resort to a court of equity.

The suggestions, briefly stated, are as follows:

(1). That we should have appealed from the Marion County Board of Review to the State Board of Tax Commissioners.

(2). That afterwards we should have filed a petition with the Board of County Commissioners for Marion County.

(3). That then we should have filed a suit in the Circuit Court of Marion County.

(4). From there we should have gone to the Appellate Court or Court of Appeals for Indiana.

(5). From there we should have gone to the Supreme Court of the State of Indiana.

(6). Thence we could have come, by appropriate proceedings, to this Court.

We say, in addition, under the plain letter of the law, that we should have had to go to the Superior Court of Marion County, sitting as a court of claims against the State of Indiana, for the State's portion of the taxes; and that thereafter, if we had succeeded in obtaining a judgment we should have had to await a legislative appropriation. If defeated, then we should have to take the course of appeals above pointed out before reaching this Court. These are the plain provisions of the statutes, and obviously should be followed if that course of procedure was adopted.

Instead of this multiplicity of proceedings before various boards and various courts, and in order to settle the question promptly, and by the proper authority for considering the question (it being a federal question), we applied at once to the Circuit Court of the United States for the District of Indiana, where we obtained prompt relief, a temporary injunction being issued to run with the subpœna.

From the judgment of that Court we come direct to this Court, without any intermediate proceedings before

County Commissioners, Tax Commissioners, County Courts, Appellate Courts, or State Supreme Courts. All of the long, tedious circumlocution has been avoided, and the question is speedily and clearly presented.

That the appellants first took some time in attempting to appeal to a court which had no jurisdiction can not possibly have any bearing upon the question. Suppose that they had attempted to appeal to the Court of Appeals of the District of Columbia: Would that fact be held to be a complication of the proceeding? Manifestly not. It would be treated, so far as the merits of the case are concerned, precisely as the appeal to the Court of Appeals for the Seventh Circuit should be treated. That is, as though it had never been done. When they say at p. 47 of their brief, we had a "short, speedy, simple, summary and cheap remedy," they speak merely of the filing of the claim before the Board of County Commissioners, utterly ignoring the numerous other steps which must intervene before the final adjudication of the matter. It is disingenuous to say that the Board of County Commissioners would probably allow the claim and order the money paid. On the contrary, common sense and human experience teaches us that in the face of the action of the taxing boards and the Indiana statutes they would probably have disallowed the claim.

The true rule for the application of equitable remedies is stated by this Court in *Watson* v. *Sutherland*, 5 Wall. 74, (18 L. ed. 580), where it is said quoting from *Boyce* v. *Grundy*, 3 Pet. 210:

> It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.

This has long been the established rule in Indiana, as declared by its Supreme Court in 34 Ind. 124; 44 Ind.

261; 67 Ind. 448; 98 Ind. 4; 113 Ind. 26, and 130 Ind. 549, in each of which it has quoted with approval the above quoted language of this Court.

If anything can be said to be the established law in Indiana, this surely must be it.

As a federal question was involved, we had a right to be heard in the federal courts.

A portion of the taxes complained of are the taxes levied for and on behalf of the State of Indiana—a sovereign State, against which no suit can be maintained, and from which taxes once paid are irrecoverable by any process of law. It follows, therefore, that any proceeding *at law* in the United States courts (to which, there being a federal question, we had a right to apply) would be futile, because, whatever judgment was rendered, it could not be enforced. To obtain a judgment without the means of enforcing it is certainly not an adequate remedy.

Therefore, the *only* adequate remedy, which could be applied by the court having jurisdiction of the questions involved, and to which we had a right to apply, would be to restrain and prevent the collection of the tax, and this could only be done in an equitable proceeding.

This will appear more fully hereinafter, in connection with other branches of the discussion.

REFUNDING OF TAXES.

On pp. 39 to 47 of their brief, appellants undertake to tell us what we should have done.

The first proposition is that we "should have paid the taxes assessed," and then done some or all of the numerous things pointed out to get them back.

On pp. 40-41 they quote the law governing petitions to County Commissioners, by Section 1 of which it ap-

pears that where it is proved to said Commissioners that taxes have been paid which were wrongfully assessed they may order the amount "to be refunded to said payer from the county treasury, so far as the same was assessed and paid for county taxes."

By Section 2 if said Commissioners find that any such taxes have been paid for State purposes they are required to certify their finding to the Auditor of State, who may order it paid.

On p. 41 a portion of the statute relating to bringing claim suits against the State of Indiana is quoted.

The section providing the means for securing payment of judgments rendered in such claim suits, however, is not brought to the attention of the Court.

The section governing this matter reads as follows:

> **Execution, non-issue of—judgment bear interest. 6.**—Whenever by final decree or judgment of said Superior Court of Marion County, Indiana, or the Supreme Court, a sum of money is adjudged to be due any person from the State of Indiana, *no execution* shall issue thereon, but said judgment shall draw interest at the rate of 6 per cent. per annum from the date of the adjournment of the next ensuing session of the General Assembly until an appropriation shall have been made by law for the payment of the same, and said judgment paid.

On p. 42 it is pointed out how the city clerk may correct the erroneous assessments "proven and made apparent to him," and how the Common Council may order "the amount erroneously assessed against and collected from any taxpayer to be refunded to him."

It must be remembered that the law providing for appeals, quoted at p. 29 of appellants' brief, expressly provides that "the pendency of such appeals shall not operate to stay the collection of any tax"; and, under the statute above noted providing for claim suits against

the State of Indiana in the Marion Superior Court, even if judgment had been obtained there for the money which had been wrongfully and unlawfully collected, still, under that statute, no execution could have issued, but the claimant must wait until an *appropriation* should be made by the Legislature of the State of Indiana. In the midst of the present socialistic crusade against corporations, when, may it please the Court, could we depend upon *legislative appropriation* to refund taxes collected from a *corporation?*

Is this an "adequate" remedy that is thus pointed out to us?

And, independently of these facts, can it be properly said that *any* remedy, which is characterized by circumlocution, and which involves a multiplicity of steps, is a plain, simple and adequate remedy, such as will preclude a court of equity from granting relief?

Administrative petitions and appeals!—court of claims proceedings!!—legislative appropriations—including lobbying, committee hearings, and the usual et-ceteras!!! These are the "adequate" remedies we are told we should have pursued.

And when, may it please the court, has it been the law, where there was a wholly illegal and unwarrantable attack upon property rights, that the attacked party must *wait* until the mischief was completed, and then sue for a recovery, instead of taking prompt steps at the inception to, by injunction, stop the unlawful act, and thereby prevent the threatened waste and save the burdensome expense.

And is it not an equally good ground for equitable relief, that proceedings at law must have a tedious and round-about character, as that they would require a "multiplicity" of actions?

In this case, however, there must have been also a *multiplicity* of actions to recover the money if it had been paid over. The bill shows that a part of the taxes were payable to the City of Indianapolis. It is not pretended that the sections 7915–16, referred to (p. 40) as authorizing proceedings before the Board of County Commissioners for the recovery of illegally paid taxes, have any applicability to the portion of the taxes belonging to the City of Indianapolis. Indeed, it has been expressly decided by the Indiana Appellate Court (*Simonson* v. *West Harrison*, 5 App. 459), that this section has no application to the refunding of taxes erroneously collected by incorporated towns. This also appears by the language of said sections which refer expressly to "county taxes" and "State purposes."

We are told (p. 37) that the presumption is that the State Board of Tax Commissioners would have corrected an illegal assessment. Remembering that the assessment in question was required by a statute of the State of Indiana, and is illegal and void only because of the superior federal law, the "presumptions" seem to be the other way. Special circumstances result in exceptions to general legal rules, as well as to other rules. It can not possibly be the legal presumption that it was the right or duty of an administrative or executive officer to "at his peril" determine that the statutes of the State of Indiana were unconstitutional. In *Huntington* v. *Worthen*, 120 U. S. 97, (30 L. ed. 588) it appears that a tax collector had ruled that a certain statute was unconstitutional. This Court having found the statute actually unconstitutional, did not disturb the work of the tax collector based upon his ruling. But so far from determining that it had been his *duty* to so find, it said:

> It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake

> to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action.

In other words, the Supreme Court in this instance excused what "as a rule" it declared not wise.

There is another reason why appellee should not pay, and then sue to recover back, clearly shown by the following authority:

> It is next suggested that since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.
>
> The reply to that is, that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation, is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere.
>
> *Cummings* v. *National Bank of Toledo*, 101 U. S. 153, (25 L. ed. 903.)

WANT OF EQUITY.

The objections urged in the argument to support the contention that the Circuit Court should have dismissed

the bill for want of equity are substantially directed against the jurisdiction of that court, the contention being in effect that State tribunals in various proceedings under the statute had jurisdiction, and, therefore, that the United States Circuit Court had not.

We contend on the contrary that a federal question was involved, which, under the decisions, brings the case clearly within the jurisdiction of a federal court.

In the case of *Starin et al.* v. *New York City*, 115 U. S. 248, (29 L. Ed. 388), this court stated the rule, and collated the authorities, as follows:

> The character of a case is determined by the questions involved. *Osborn* v. *Bank of U. S.*, 9 Wheat. 824. If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia*, 6 Wheat. 279; *Osborn* v. *Bank of United States*, 9 Wheat. 824; *The Mayor* v. *Cooper*, 6 Wall, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 201; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 140; *Ames* v. *Kansas*, 111 U. S. 462; *Kansas Pacific* v. *Atchison R. R. Co.*, 112 U. S. 416; *Provident Savings Soc.* v. *Ford*, 114 U. S. 641; *U. Pacific R. R. Removal Cases*, 115 U. S. 11.

APPELLANTS' AUTHORITIES.

Appellants have cited many authorities, (and might have cited many more), the gist of which is to establish various propositions which may be summarized as follows:

1. Equity will not intervene where there is a plain, simple, complete and adequate remedy at law.

2. That no injunction will be granted against merely excessive taxation; or, as it is expressed in many cases, against an unjust or unequal *valuation.*

3. That in the *valuation* of property the action of a duly authorized tax board is final, and can not be set aside except for fraud, or some action which would render the assessment wholly void.

These propositions, from appellee's standpoint, need not be controverted or questioned. Time will not permit an elaborate review of all of appellants' authorities, and, therefore, those which seem to bear wholly or mainly upon the above propositions will mostly be omitted from the discussion. During a hasty examination of appellants' authorities as a whole, however, some thoughts have occurred to counsel for appellee, and these will be brought together at this point in the discussion.

The case of *Crown Cork & Seal Co.* v. *Maryland*, 87 Md. 687, which is so elaborately quoted from and discussed by appellants' counsel, brief pp. 89–94, is easily to be distinguished from the present case. In that case it appears that the corporation *purchased* patent rights. It does *not* appear that the stock was issued for the patent rights. There is a wide difference between the two cases. In the one case the stock is solely the representative of patents, and nothing else. In the other case, the patents having been purchased *subsequently* with cash, have no necessary direct connection with the stock.

In the *Crown Cork & Seal Co.* case, also, appellee submits, with all due respect, that the Court's opinion contains much that is unsound, both in law and in logic. Its remarks, so far as they bear directly upon the ques-

tions presented here, are also largely in the nature of *obiter dicta.*

The Court (at p. 698) itself says:

> It will remain *for future consideration* whether a patent right may not of itself be a proper subject of taxation, but that as just stated is *not* a question necessary to be decided on this appeal.

Distinguishing further, it appears, by the opinion of the Court (at p. 696), that in Maryland—

> the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax.

The Court further declares (at p. 700) that the rule in Pennsylvania that "the tax being upon the capital stock, it is a tax upon the company's property and assets", is "not the law of Maryland".

It is difficult to see, therefore, even conceding the conclusion of the Court under the law of Maryland to be sound, (which we are by no means prepared to do), how that case can be regarded as much of an authority here, where the law of the State is very different from what the law of Maryland is declared to be.

Storage Battery Co. v. *Board of Assessors*, 60 N. J. L. 66.—In this case, as in *People* v. *Campbell*, there was no such contention made as in the case at bar. The Court, at p. 68, says:

> The contention is that the company is wholly exempt from taxation by force of the proviso in Section 4 of the Act of 1892. Gen. Stat., p. 3337, Section 260.

The statute in question provides that corporations "shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock

issued and outstanding", etc., and the *proviso* in question reads, in part, as follows:

> *Provided*, that this act shall not apply to . . . . . manufacturing or mining corporations at least 50 per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State.

In this New Jersey case, therefore, there is a very clear and a very broad distinction to be drawn. In New Jersey the tax upon the capital stock is the tax levied upon the corporation *for the privilege of* ***being*** *a corporation* under the New Jersey laws. Whether the company has any assets at all or not has nothing to do with the case. It is the same as the fee charged in many States, including the State of Indiana, for the privilege of becoming a corporation, and maintaining itself as a corporation. In the quotation given by counsel this clearly appears, which quotation contains (p. 95) the following language:

> Corporations of the class to which this company belongs are taxable with respect to the capital stock issued and outstanding ***as a fixed factor*** without regard to the purpose for which the capital stock was issued or whether issued for value or not.

In other words, there is no "valuation" of the capital stock involved in this taxation at all. It is in the nature of a license tax or fee and nothing else. It would be hard to imagine conditions more different than those of this case.

Clement v. *People*, 177 Ill. 144.—Is merely to the effect:

> That the Courts have no power to revise an assessment merely because of a difference of opinion as to the reasonableness of the valuation placed on the property.

And that fraud cannot be established by testimony amounting rather to "inferences or conclusions" than to statements of facts.

Kinley Mfg. Co. v. *Kochersperger*, 174 Ill. 379.—Relates to a simple case of *over-valuation*, and the judgment of the lower court dismissing the bill was affirmed upon the ground that

> A Court of Equity is not empowered to value property for taxation, but these boards afford ample remedy for all errors in *valuation*, and they must be resorted to for relief when complaint is made *in that regard.*

Keokuk Bridge Co. v. *The People*, 161 Ill. 132.—Is a case where taxing officers in Illinois had erroneously included 850.52 feet of a bridge not within their jurisdiction, but lying beyond the Illinois line, in the State of Iowa, in their assessment. The Court, after stating the familiar rule that "courts have no power to revise an assessment merely because of a difference of opinion as to the reasonableness of the valuation placed upon the property", continued:

> In the case at bar, the bridge from the State line to the east end of the draw-span was not within the limits of the jurisdiction of the State, and *there was no power or authority to assess the same for taxation in this State.* Said property was not subject to taxation here. The effect of including its value in the valuation made by the assessor was to render the assessment invalid.

And *reversed* the judgment.

If appellants can get any comfort from this authority, they are welcome to it.

In the other case of the *same title*, 161 Ill. 514, the questions merely relate to clerical errors of the printers in the printed proceedings of the State Board of Equali-

zation, and to *over-valuation*. These matters have no bearing on the case at bar.

People, etc., v. *Campbell*, 138 N. Y. 543.—Is a case much relied upon by appellants, and extensively quoted from in their brief. It is to be regretted that they did not quote the entire case. We will supply some of the deficiencies:

The *official reporter's* summary of the contention of appellant contains the following:

> The capital stock of the relator invested in Letters Patent of the United States and of other countries in North and South America is not liable to taxation here, *except* in so far as the said Letters Patent of the United States *apply to the territory within the State of New York.*

The point of this case, therefore, that patents are not taxable at all, was not made in that case. Courts do not commonly decide points not presented for decision.

The Court, (by EARL, J.), near the beginning of the opinion, shows that its understanding of the question to be decided was the same as that of counsel, by saying:

> The relator does not complain that the value placed upon its capital was too high. But *it claims that none of it was employed within the State*, and hence, that none of it could be the basis of taxation under the act, and *whether* ***this claim*** as to the entire capital or any portion of it *is well founded is the* ***sole matter*** *for our determination.*

The New York Court of Appeals did *not*, in *People* v. *Campbell*, pass upon the question now before us, because no such question was there to be passed upon.

Beginning at p. 96 of their brief, appellants elaborately discuss and quote from the "Bank Tax Cases," or *Van Allen* v. *Assessors*, 70 U. S. 573.

Undoubtedly, these are leading cases, and the decision there reached by a majority of the Court is of great importance, and settled important questions of taxation.

But these cases seem to have no application to the case at bar, as the facts are widely different, and the statutes involved still more widely different.

The Court in that case, after enumerating the provisions of the Act of Congress under which national banks are established, said:

> Now, these are *very great powers and privileges* conferred by the Act upon these associations, and which are founded upon a **new use** and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money,
>
> . . . . . .
>
> In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly, we find them in this charter. They are very few, but distinctly stated.
>
> They are, *first* . . . . . and *fourth*, ***a State tax*** upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks.
>
> . . . . . .
>
> The question involved is altogether a different one from that decided in the previous bank cases, and stands upon different considerations. The State tax, under this Act of Congress, involves no question as to the pledged faith of the government. **The tax is the condition for the new rights and privileges conferred upon these associations.**

The Court proceeds to point out a distinction between shares held by individuals, and the capital stock of the corporation, and shows how Congress had provided that the president and cashier of such banks shall

cause to be kept at all times a full and correct list of the names and residences of all the shareholders, and the number of shares held by each, which list shall be subject to the inspection of shareholders and creditors "and the officers authorized to assess taxes under State authority", etc.

In the present case we find no such conditions. There is no **new use** of Letters Patent specially conferred by Act of Congress upon this corporation. There are no great and extraordinary "powers and privileges" here to be considered. The patents in question are ordinary patents, issued in the ordinary way, with the usual rights and privileges which are granted when patents are issued, and no others. The corporation can make no other or different use of its patents than an individual could. The corporation is organized under the general Indiana law governing the organization of ordinary corporations. There is nothing whatever in that law which prevents it from owning and using patents. There is no reason, in fact, or assigned, why it should not make this ordinary and regular use of its patent privileges. There is no suggestion here that the State of Indiana has ever attempted to restrict its corporations in the matter of ownership or use of patents. In short, the corporation stands before us, in respect to its ownership of patents, precisely as an individual patentee or owner of patents might do. There is no legerdemain involved in the matter. There is no mystery to be solved. Appellee is under no legal disabilities in respect to any question here presented. It has the same rights, as a suitor, that any other person, natural or artificial, might have. And the questions to be decided are not to be decided in view of *special* legislation granting "very great rights and privileges", (such as the privilege of issuing its notes for money), but are to be decided

wholly under the *general* legislation governing patent property, under which it stands, and must stand, in the same position as any other owner of patent property.

In the case of *Owensboro National Bank* v. *City of Owensboro*, decided by this Court, April 3, 1899, after citing *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 738, and *Davis* v. *Elmira Savings Bank*, 161 U. S. 283, (from the latter of which a quotation is taken) the Court says:

> It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of of Congress.

These bank cases, therefore, are not authorities for the contentions of appellants in this case. Congress has not passed any act permitting the taxation of patents, or "patent rights", and it may further be said that obviously these cases constitute no exception to the rule that that which can not be done directly can not be done indirectly, because United States bonds are *always* included in the capital of national banks. The authorization of the act of Congress was complete, and Congress knew when it passed the act that a part of the stock of a national bank *must* (sec. 5159 R. S.) be invested in Government bonds, because a bank can not be a national bank without owning Government bonds—and, therefore, Congress here has directly—as directly as if it in terms had said so—authorized the taxation of bonds so held. There is nothing indirect about it. To authorize a thing to be done which necessarily and inevitably causes another thing to be done, is the same thing as authorizing that other thing to be done,—under all the rules of logic, reason and common sense.

Appellants in their brief (p. 35) quote from this Court in *Adams Express Co.* v. *Ohio*, 165 U. S. 219, the following:

> Construction by the State courts of last resort of State constitutions and statutes will ordinarily be accepted by this court as controlling.

We do not perceive what bearing this has upon the present controversy, as it is a construction of the *federal* constitution and laws which we are seeking, and not a construction of the State constitution and laws. The only contention concerning State laws arising under the issues made by the pleadings in this case, and which is presented to the Court for determination, is whether or not the statutes of the State of Indiana providing for the taxation of "patent rights" are or are not in conflict with the federal law. In other words, we insist that it is this *federal question* which is to be determined, for the determination of which we believe we had the right to resort to the federal courts, and it has not been suggested that any more appropriate remedy might have been sought in the federal courts than that which was applied for. Indeed, there is no suggestion any where in appellants' brief that we might have pursued *any* other course in the federal courts than that which we did pursue. The entire contention is that we should have applied to State tribunals for our remedy. If we are correct in our contention that we had the right to go to the federal court, it is entirely immaterial what course might have been proper had we gone to the State tribunals. The question, therefore, turns upon whether or not we had the right to have the federal questions involved determined in a federal court.

If we had the right to go to a Federal Court at all, we had the right to bring such a proceeding there as would be effective.

It is a distinct allegation of the bill of complaint (transcript, p. 6) that the taxation was in large part

> for and on account of and for the benefit of the State of Indiana, a sovereign State, and one of the United States, and that under the Constitution and laws no suit can be maintained against the State of Indiana. That it is a part of the duty of the said defendant, Sterling R. Holt, Treasurer, as aforesaid, to pay over into the treasury of the said State of Indiana a large proportion of the amounts so received and collected by him as taxes, and, therefore, that if said amounts are so collected and received and paid over, they will become mixed with the moneys of said State, and thus be beyond reach of any process of this or any Court, and irrecoverable, and that great and irreparable injury will result to your orator if such unlawful collection and paying over as aforesaid be not prevented.

There is no denial of this allegation in the answer, nor is it there pointed out how we might have proceeded better, or differently.

The uncontroverted allegations of the bill must certainly be taken as true, and if true, it is hard to imagine any effective remedy not embodying injunctive relief.

The only remedies suggested by appellants' brief begin with a series of administrative appeals and petitions, not before Courts, but to Tax Boards and County Commissioners. And when, in the course suggested, we should finally reach a court, it would not be a Federal Court (to which we had a right to apply to have our federal question determined) but a State Court. If we had pursued the course now suggested, it may be remarked, the hearing here would have been the sixth, instead of only properly the second.

From every point of view, therefore, it seems the course pursued by appellee was the proper one.

A pertinent authority against the course suggested by appellants is found in the decision of this Court in *Morgan* v. *Beloit*, 7 Wall. 613, (19 L. ed. 203), where the Court said:

> If the town should be compelled to pay the entire amount, the right is given by the statute to recover back the proportion for which the city is liable. ***This would involve circuity of litigation.*** The remedy at law is, therefore, neither plain nor adequate.

In the *State Railroad Tax Cases*, 92 U. S. 575, (23 L. ed. 663) which has been cited by the appellants, we find much which is instructive.

In that case, among other things, the Court says:

> One of the reasons why a Court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State.

This objection does not obtain in the present case, as, whatever the event, no new assessment is to be made. The assessment complained of will stand, or it will be wholly wiped out.

The Court also, in giving reasons why the decrees should be reversed and remanded with directions to dissolve the injunctions, stated:

> There is no violation of the constitution, either in the statute or in its administration, by the board of equalization. No property is taxed that is not legally liable to taxation; nor is the rule of uniformity prescribed by the constitution, violated.

In the present case appellee contends that there has been a violation of the constitution, and that property *has* been taxed that is "not legally liable" to taxation.

Further along the Court observes that it is a profitable thing for corporations to obtain a preliminary injunction as to all their taxes and contest the case for

several years, and at the end submit to pay what is found to be due, and states that before a bill can be maintained, what is conceded or appears to be due must be paid. In this case appellee did pay all and more than seems to be due.

It will thus be seen that appellee has scrupulously kept itself within the law as laid down in this case. It seems, therefore, that it is an authority rather in its favor than against it.

In *P., C., C. & St. L. Ry. Co.* v. *Board of Public Works of the State of West Virginia*, 172 U. S. 32, this Court quotes approvingly from the "State Railroad Tax Cases", and thus it may be considered that the decision in the last named case was reached subject to the rule laid down in the former case. It does not appear, at all events, that any federal questions were presented, such as are inseparably involved in the determination of the case at bar.

In the *State Railroad Tax Cases*, *supra*, this Court said:

> These reasons and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is a part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State. High, Injunc., Sec. 369 and cases there cited. The assessments in the case before us, of which complaint is made, are all made by the State Board of Equalization; and though the taxes

> are collected by the county authorities, a large part of them go to make up the revenue of the State.

It would seem, therefore, that this Court has recognized a distinction between the taxes levied by a State Board of Equalization and taxes levied merely by county officers, and we call the Court's attention to that distinction.

This taxation, while partly for the benefit of the State of Indiana and partly for the benefit of the City of Indianapolis, was levied by Marion County, and the officers against whom this proceeding was directed are county officers.

The action of no State official is involved in this case.

In this same case the Court also said:

> We do not purpose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction.

It would seem to us that for numerous reasons given in this brief we have brought this case "within some of the recognized foundations of equitable jurisdiction."

If upon the authority of the *State Railroad Tax Cases* it is urged that we should have paid the State taxes, and confined our suit to the county, city and township taxes, we reply: If we had paid the State taxes, we had no remedy at law for their recovery, because suit in the Superior Court of Marion County would not have resulted in a judgment which could have been enforced by execution and until an appropriation was made by the legislature such judgment would be of no avail. This remedy, therefore, is entirely inadequate. Moreover, it was a remedy which could not be resorted

to in the federal courts, to which complainant, (by reason of this case presenting a federal question) had the right to resort to recover money for taxes illegally exacted from it, or, in a proper case, to enjoin their collection. Certainly, we can not be compelled, in the first instance, —where we have a cause of action arising under the Constitution and laws of the United States, and a right to resort for an enforcement of our remedy, whatever it is, to the federal court,—to resort to any remedy provided by the State statutes which can not be administered in federal courts, or which would not result in a judgment which would be directly enforced by the Court. If it were otherwise, our right to resort to federal courts would be taken away by State legislation, and, clearly, no suit at law can be maintained in a federal court to recover State taxes, because the suit must be either directly against the State, or a State officer representing the State. Prohibition to sue a State equally applies against a State officer, acting for and representing the State.

Therefore, the statutory remedies suggested,— appealing to the State Board of Tax Commissioners of the State of Indiana, and application to the Board of County Commissioners of Marion County, and application to the Common Council of the City of Indianapolis, for the refunding of taxes illegally collected,—do not apply:

1. Because they can not be administered in the federal court; and if appellee was required to resort to them, it would be deprived of its right to resort to the federal court.

2. Because they do not result in a judgment which can be enforced by the Court by ordinary processes. They are, therefore, not an adequate legal remedy, such

as would prevent equitable relief by injunction in the federal courts.

3. It is also the established law in the State of Indiana that the collection of an illegal tax can be enjoined notwithstanding the statutory remedies for the refunding of such taxes when paid.

Hyland, Auditor, et al., v. *The Brazil Block Coal Company*. 128 Ind., 355, is an authority in point. There the company had made a full return of its taxable property, and the proceeding was to enjoin the collection of a tax levied on its capital stock, which was assessed additionally to the tax on the property. In the course of its opinion the Court, at p. 342, said;

> The plaintiff does not seek to defeat a part of an assessment, but it seeks to prevent the levy of an assessment upon property not subject to taxation. The statute does not, as we have seen, authorize the assessment of the capital stock, and as there is no property subject to taxation, there can be no part of an assessment which the appellee is bound to pay.
>
> As it is made to appear by the complaint that the capital stock did not exceed in value the tangible property returned for taxation, there is no question as to the effect of the finding of the Board of Equalization; for the question is whether the Board can assess property which, by law, is not subject to taxation. If the property—that is, the capital stock—had been subject to taxation, then the question as to whether the value placed upon it by the Board is final and conclusive would be presented, but as the confessed allegations show that the capital stock was not subject to taxation the Board had no authority over it, since it is clear that the Board can not make property of any kind subject to assessment, when there is no statute conferring that authority upon it.

The foregoing case is closely analogous to that at bar. Here we show, as there, that "there is no property

subject to taxation," and the property is, as there, the "capital stock." We say that over this property, under the evidence made as to its character, that "the Board had no authority."

It may be said that there is an Indiana statute authorizing such assessment, but as this Court said in *Allen* v. *B. & O. R. R. Co.*, *post* (pp. 84-85) "an unconstitutional law will be treated by courts as null and void."

It would seem that a plaintiff who has a right to go into the federal courts, because of diversity of citizenship or of a federal question being involved, should be allowed the remedy of injunction whenever, under the facts stated in his bill, it would be sustained in the State courts, as would seem to be the case in Indiana, under the authority last quoted from.

The case of *Shelton* v. *Platt*, 139 U. S. 591, (35 L. ed. 273) is to be clearly distinguished from the case at bar in many particulars, which are easily apparent upon an examination of the opinion.

The notable and conspicuous matter, however, to which we desire to especially direct the attention of the Court, is the broadly different statutory condition existing in Tennessee from that which exists in Indiana. The Tennessee Statute, Sections 1 and 2 of the Act of 1873, set out in the statement of the case in *Shelton* v. *Platt*, shows a plain, direct, unitary and simple statutory remedy in *all* cases of unlawful taxation, and which covers *all* such taxes and enables *all* such questions to be determined in a single proceeding.

The statutes of the State of Indiana, quoted in appellants' brief, do not, as those of Tennessee do, afford the single, simple, plain and adequate remedy which is necessary to oust equity of its jurisdiction.

This point will not be argued further, as a mere comparison of the statutes in question, which can con-

veniently be had from appellants' brief and the report of *Shelton* v. *Platt* will make it plain.

In *Jones, Treas.* v. *Gas Co.* 135 Ind. 595, cited by appellants at p. 38 of their brief, the Indiana Supreme Court, on p. 599, say:

> This case was tried upon the theory that the appellee was entitled to relief if it succeeded in showing that its whole capital was invested in tangible property returned for taxation, and that its capital stock did not, in fact, exceed in value such property. The theory is erroneous. Had this been a trial, on appeal, to a tribunal authorized to correct the assessment, the theory would have been correct, but, in a collateral proceeding like this, it was necessary to go farther and show that *some fact existed which rendered the action of the board of equalization void.*
>
> *Unless* its action was void, the collection of the tax levied upon its assessment can not be enjoined.

This shows clearly that in Indiana if any fact can be shown on the trial of a suit in equity which renders the taxation *void* the collection of the tax may be enjoined.

If the law in Indiana, as declared by its Supreme Court, has any bearing upon this case, it establishes (the tax being shown to be void because levied upon "patent rights") that the taxation might properly be enjoined.

The "*Dows Case*", 11 Wall. 108, is cited (appellants' brief, p. 17) upon the point that a bill to restrain the collection of a tax will not lie unless the case is brought within some acknowledged head of equity jurisdiction. Appellee sees no occasion to controvert the legal proposition thus laid down, and calls attention to the fact that this Court cited approvingly in that case *Heywood* v. *Buffalo*, 14 N. Y. 534, to the effect that the rule that a court of equity will not entertain an action by the party aggrieved, for relief against erroneous or illegal assess-

ment, is subject to *three exceptions*, which this Court stated as follows:

> Where the enforcement of the assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or **where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity.** Whenever a case was made by the pleadings falling within either of these exceptions, the court said that equity would interfere to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud upon the title, but would not interfere where none of these circumstances existed.

Appellants, at p. 83 of their brief, say:

> The assessment complained of in this case was made against the shares of capital stock of an Indiana manufacturing company. It was not made against any patent or patents.

And, after discussing the tax statements, on p. 84 say:

> Therefore, no assessment whatever was placed against the patents *co nomine*, for either of the years 1892, 1893, 1894 or 1895.

In this view of the case the assessment "on the face of the proceedings" seemed to be entirely valid and regular because it was authorized and required by the statutes of the State of Indiana, and by the forms printed in pursuance and in accordance with said statutes. It required "extrinsic evidence to show its invalidity". Until the fact that patents issued under the Constitution and laws of the United States were the sole basis for the stock was made evident, there was nothing, if appellants' contention is correct, to show that the assessment was not a proper one.

Under the authority above cited, therefore, this equitable proceeding is clearly authorized.

In nearly all of the cases cited by appellants' counsel the question of *value* seems to be the leading and con-

trolling one. In this case there is no such question The real issue is whether or not the federal law renders the assessment under the Indiana law wholly void.

As was lately well said by the Supreme Court of Texas:

> The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements.
>
> *Hutcheson* v. *Storrie*, 51 S. W. Rep. 848-852.

INTERSTATE COMMERCE ANALOGIES.

There is another subject in which the respective powers and duties of the Federal Government and the State Governments have been drawn in question, and in respect to which this Court has been repeatedly called upon to define the law. This subject is interstate commerce, and many of the questions which have arisen in such litigation bear a strong analogy to those now under consideration.

In the case of *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489, (30 L. ed. 694) this Court said:

> Certain principles have been already established by the decisions of this Court which will conduct us to a satisfactory decision. Among those principles are the following:
>
> . . . . . .
>
> 2. Another established doctrine of this Court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions;
>
> . . . . . .
>
> 3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its *police power*, and its jurisdiction over persons and property within its limits, a State provides for

—various matters not necessary here to enumerate.

Applying these principles to the present case, it may be said that the power of Congress respecting patents

under the Constitution has been exercised, and it having failed "to make express regulations" respecting the taxation of patents, "indicates its will that the subject shall be left free from any restrictions or impositions"; subject, nevertheless, of course, to the *police power* of the States, as held by this Court in *Patterson* v. *Kentucky supra.*

In the case of *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, (30 L. ed. 1200), this Court in further discussion of these questions used the following language:

> In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the *principal* forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, *its inaction*, as we have often held, *is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and* **its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system.**
>
> . . . . . .
>
> Nor does it make any difference whether such commerce is carried on by individuals or corporations.
>
> . . . . . .
>
> The corporate franchises, the property, the business, the income of corporations created by a

> State may undoubtedly be taxed by the State; but *in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection,* interstate or foreign commerce, **or any other matter exclusively within the jurisdiction of the Federal Government.**

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, (32 L. ed. 311) this Court stated that "upon the fairest and most just construction of the Constitution"

> no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.

So we say that a State has no right to lay a tax on patent rights "in any form", whether directly upon the patents themselves, as required by the Indiana statue, or upon the stock of a corporation issued for and representing such patents, for the reason "that such taxation is a burden" upon the federal franchise granted by the Government of the United States, "and amounts to a regulation of it, which belongs solely to Congress".

In *Crutcher* v. *Commonwealth of Kentucky*, 141 U. S. 47, (35 L. ed. 649) this Court said:

> We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

We say here "that a state law is unconstitutional and void" which requires a party to pay a tax on a patent right, directly or indirectly, "no matter how specious the pretext may be for imposing it."

After each of the statements above quoted from the decisions of this Court, a long list of authorities is given in the opinion. We deem it unnecessary to carry the argument further upon these propositions, or to call the Court's attention to further authorities relating thereto.

POWER OF THE STATE.

The tenor of portions of appellants' argument seems to be to the effect that the State has the right to tax its own corporations as it pleases, and thus that a different rule may be applied to corporations, in cases like that at bar, from the rule which would govern such cases where individuals are concerned. It is readily conceded that corporations are in some respects different from individuals; and it is equally true, perhaps, that the legislature might enact measures under which the distinction should be still more marked. But no statute has been called to our attention limiting the rights of corporations in respect to the ownership of this class of property. Under what authority, therefore, or for what legal reason, are we to distinguish between the right of ownership in a natural person, and the same right in a legal person, when and in cases where no law exists for the distinction?

It is not contended that there is any statutory distinction applicable to this case. Indiana has imposed no such distinctions or restrictions upon its corporations. This corporation must therefore be held to have the unrestricted right to purchase and own Letters Patent, the same as an individual would have—and to have the same rights under the patents which it may own as an individual would have—and to have no burdens because of such ownership that an individual would not have.

It may, perhaps, be said that a State has plenary power over its domestic corporations; that a State may

refuse to create any corporations; or may refuse to create them except for certain purposes; or may refuse them the power to own certain kinds of property. But a State has not the power to make patents taxable, either directly or indirectly;—nor can it, as a matter of law, make that lawful when attempted by indirect methods which is unlawful when attempted by direct methods.

The State of Indiana has *not* passed a law that a manufacturing corporation shall not own patent rights, nor can it, indirectly, under the guise of taxing corporate stock, tax those patent rights. If the State of Indiana shall hereafter provide that none of its corporations shall own patents, a different question may be presented, but "sufficient unto the day is the evil thereof." That question is not now before us.

HOW THE STOCK WAS PAID UP.

On pp. 49 to 51 of appellants' brief the contention is that the company must be held to have a fully paid-up stock, the inference which is drawn being that it must also be of *taxable value* to the amount of its face.

Avoiding a *direct* charge of fraud in the matter, which was incautiously made when the case was before the Court of Appeals, a quotation from the Indiana case of *Clow* v. *Brown*, 150 Ind. 185, is used in such a manner as to give the *impression* of fraud.

It is true that the returns for taxation show that the stock was fully paid up. But paid up in what? The uncontroverted evidence is that it was paid up in *patents*. In the early days of the corporation, continuing up to about the time this suit was brought, it had some bad luck, and the valuation of its patents was so low that the stock was regarded as only worth 10 cents on the dollar. In recent times the corporation has had some profitable royalty contracts, and its income has grown because of the increased use of its patents, so that its

stock, which represents the patents, is probably worth par or better today. As the Court must well know, patents are valuable or not according to whether or not profitable use can be made of them. If the income from a patent is but, say, $500 a year, remembering that the life of a patent is only seventeen years, its total value, at the most, is $500×17 minus a discount, at current money rates, sufficient to reduce the sum to "its present value"—as an actuary would say. When the income grows to $5,000 per year the value of the patent has become multiplied by 10, deducting the proportionate part of the term of 17 years which has elapsed; and when the income grows to $50,000 per year the same rule will apply, and the patent becomes proportionally more valuable.

An individual owner of a patent has never been taxed, so far as counsel for appellee is aware, upon the patent which he owned. Joint owners or co-partners may own a patent; and they are no more to be taxed upon their undivided interests than a single owner. If the owners of a patent are numerous it is nothing strange that they should organize into a corporation, assign their patents to the corporation, and receive *stock* of the corporation, in proportion to their interests in such patents, in exchange therefor. Such an organization, as is well known, is considered more convenient than a numerous partnership. But the value of the patents has not been multiplied, nor is there any difference in value or character between the ownership, for example, of a one-tenth interest in a patent and the ownership of 10 per cent. of the stock of a corporation organized to own the patent.

If there is anything in the contention of appellants in this matter, it is, when reduced to the last analysis, that the patents were *overvalued* when the corporation was first formed. But what bearing has that fact, if it be a fact, upon the present controversy? No credi-

tor, or even stockholder, is complaining. If the organizers of appellee overvalued their patents, it was merely, so far as anything here involved was concerned, a kind of harmless amusement—a sort of Col. Sellers way of looking at things—which, however it may offend appellants' taste, or jar upon their sense of the proprieties, is certainly not such an act as ought to subject appellee to legal pains and penalties.

May not parties in good faith and among themselves fix the nominal value of their own property at any price that pleases them? What harm has been done? It is not pretended that any human being was ever harmed, mislead, or lost a dollar because of this or any transaction in which appellee was ever concerned.

And even let us suppose, although there is no evidence to support such a contention, that appellee's stockholders failed to comply with the Indiana statute respecting the payment of stock subscriptions, how did appellants become vested with jurisdiction of such a matter? They were not, individually or collectively, a proper tribunal to determine the question, nor did they adopt a procedure appropriate for such a determination, even had the matter been within their jurisdiction.

As to the value of the patents in proportion to the value of the stock, the *assessor* fixed the value of the patents, as listed in the return, as has heretofore been stated. Said patents may or may not be worth $20,000, or $25,000, or $360,000, or any intermediate or other sum. Appraisements of patents from the nature of things must vary as widely as the differences in men's minds. The question of whether or not these particular patents were *as* valuable, or *more* valuable, or *less* valuable, than the assessment, is not a proper one for consideration here.

Mr. Sharpe was cross-examined as to this question of value, and while the question is not a material or pertinent one, it is somewhat interesting. This testimony is found on p. 30 of printed transcript, X-Qs. 81 to 85, inclusive. No such matter having been inquired about on the examination-in-chief, if the testimony is admitted at all, appellants must be held to have made the witness their own.

As showing how the stock of Indiana corporations *ought* to be paid up, appellants, at p. 50 of their brief, cite and quote from *Clow* v. *Brown, supra*. This quotation does not fairly show the character of the case. An examination of the complete case shows that it is one of that long line of decisions, in cases brought by creditors of insolvent corporations, wherein it is held:

> that unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors.

In said case $200,000 of capital stock had been issued and turned over to contractors and promoters without the payment—or pretense of payment—of a cent of value of any kind, the transfer being, as the Court designated it, "a mere gratuity".

In that case, however, the Court said:

> No doubt, the appellees, constituting, as they did, the whole company, might, as to themselves and the corporation, make a gift of the stock. They could not complain of their own act. But the representation of this stock to the world as paid up, when the payment made was a mere fiction, was nothing short of an imposition on all those who might deal with the company in good faith.

In the present case there are no unpaid stock subscriptions, nor are there any complaining creditors. The company still has the *identical* property for which the stock was issued, and the value of one is necessarily the

value of the other. We challenge a critical examination of every word of the record in this case, and defy the production or discovery of any evidence showing any lack of good faith in the transactions of appellee.

In this case the stock and the patents are interchangeable terms, and each is the equivalent in value of the other.

At a previous stage in this case appellants cited a long list of these authorities in support of their then direct charge of fraud.

One of these cases,—viz.: *Crawford* v. *Rohrer*, 59 Md. 599—was a case where the stock had not been fully paid for, and the company having become insolvent, creditors were suing to recover their debts. In this case ***patents*** *had formed a large part of the consideration paid for the stock when issued, and this transaction was not disturbed by the Court*, but judgment only went for a balance shown to be due from those who had agreed to pay *cash* for their stock. It is respectfully submitted that this is an authority *for*, rather than *against*, appellee, if it has any bearing upon the present controversy.

Where is there any support in such authorities for an attempt to tax a corporation on its stock, when the argument is that the property for which such stock was issued is only worth $25,000 although the face of the stock is $360,000? Is it anywhere intimated in any of them that there would be any justice in *taxing* the corporation illegally, or even on an excessive valuation? If so, I have failed to discover it.

In some of these cases real estate was the property under consideration.

Disregarding for the moment the difference between real estate, *which can be closely appraised*, and patents, the nominal value of which depends wholly upon whether the owners are optimists or pessimists, we find

in the case at bar neither creditors nor stockholders asking any relief, but taxation-mad petty tax officers, seeking to plunder a corporation by unlawful taxes, on the plea, among others, that the non-taxable property given for the stock was overvalued.

Finally, on this subject, permit me to say, that appellee *did* pay $360,000 of its stock for the "patent-rights". And there was no "fraud" about it—either upon the law or upon the stockholders. Everybody connected with the company knew exactly what they were doing, and they all, so far as any evidence in this case shows, were then, and have ever since remained, entirely satisfied with the transaction. No creditor or stockholder of the company is finding any fault. We deny that there was any "simulated subscriptions" or "sham payments"; and we deny, with equal emphasis, that it was any of appellants' business if there had been,—as it could not have changed the actual value of taxables;—and, if it *were* their business, they have made no such issue in this case. The payments of the stock subscriptions were full payments—but they were made in *patents* and *not* in money. No taxables were juggled out of sight in the transaction, or other venality committed, as appellants' counsel would have the Court believe. The officers of my client are honorable men, who do not commit frauds. And they ought not to be—even inferentially—charged with fraud, or the attempt made to brand them with fraud, in a case where no such issue is raised by the pleadings, and no evidence has been given to support such a charge.

And again: Can it be said, as a matter of equity, that the stockholders of this company should be mulcted in unlawful taxes because it is questioned whether the patents owned by said company are or have been as valu-

able as they were claimed to be when they were assigned to the corporation in exchange for its stock.

PRIVATE SALES OF STOCK.

Certain private sales of stock were (improperly) inquired about in the cross-examination of Mr. Sharpe. These are tabulated at p. 61 of appellants' brief. This seems to be irrelevant.

What difference does it make how, when, where, or to whom, *individual* stockholders have sold or traded their stock, or what the consideration might have been which they received therefor? The *corporation* itself is the party to *this* cause; and the individual stockholders are *not* parties.

Comment is made upon the fact that $54,930 par value of appellee's stock is now "held by shareholders other than the inventors of the patents". Appellee's counsel is unable to discern what this has to do with the issues of this case. It is quite possible that *all* the stock may be held by persons "other than the inventors"; but if so, the inventors hold the money or other tangible property which was paid for it, and are—or, at least, ought to be—taxed on such holdings. The stock still continues to be the representative of the patents for which it was issued;—and appellee neither can control; is responsible for; or has any particular interest in, the sales or transfers of its stock from time to time. In these various trades *between individuals* it can not even be pretended that the taxing powers have lost anything. The stock representing the patents was not taxable in the hands of the original owner; and the money or other property *was* taxable in the hands of the stock purchaser when the transfer was made. Then the fellow who had the *stock* got money or property on which *he* thereafter had to pay taxes, and the fellow who had had the money or property

got the stock, *representing a share in these patents*, and which as before stated, was *not taxable*. It is difficult to perceive how this harmed any one. The *stock* was the *same* stock; the *individuals* holding it *changed*.

The corporation is assessable on the taxable property which it owns, and not on the patents which it owns, and the stock is clearly shown to be only the representative of the patents.

It is stated at p. 64, that the great profits of manufacturing companies "comes from manufacturing articles under patents." It is readily conceded that a corporation owning meritorious patents has a greater *earning power* because of that fact; but that the ownership of patents at all affects the "value" of their taxable property, is not true, further than that the increased earnings when received are taxable, and to that extent the taxing power is benefited.

And this is also an answer to the argument that large *values* would escape taxation. There is no intrinsic value in a patent, and, it being a federal franchise, its earning or income-producing value is not taxable, although the income or earnings, after they have been received, are.

SHOULD STOCK BE TAXED TO FULL VALUE.

The argument is that the State may tax capital stock up to its full market or actual value. Can this be true in all cases? Let us illustrate: Suppose the corporation owns *real estate* in other States where it is taxed. Certainly such ownership is an element of value to the stock, but if the stock could be fully taxed where the corporation has its home, then it would be subject to double taxation. This, of course, is not allowable. Indeed, in one of appellants' principal authorities (*Hyland et al.* v. *Central Iron & Steel Co.*, 129 Ind. 68), the Court says:

> It seems quite clear that no taxpayer can be taxed twice upon the same property, and so the authorities declare.

citing several authorities.

And again, as is frequently actually the case, suppose a manufacturing company has branches in several States other than the State in which it is incorporated and does business, and owns large amounts of personal property which are kept at such branches, and are there taxed. Is it possible, although half or more of the corporate assets are distributed throughout other States, where they bear their just and proper burden of taxation, that still the corporation must be taxed on the full value of its stock in the State where it is incorporated and in which its principal office is located?

These illustrations show the utter fallacy and absurdity of the contention that the corporation must be taxed for the full market or actual value of its capital stock.

And, let us not forget, a ***patent*** covers the *entire* United States and Territories—from the St. John to the Rio Grande—from Cape Cod to the Golden Gate—from Alaska to the Mexican boundary—as well as the territory administered by "The Division of Insular Affairs." This being true, what justice would there be, even were it lawful, to tax the entire value within and for the benefit of, a single State?

Beginning on p. 61, of their brief appellants make a curious argument based upon the collection and dirbursement of considerable sums of money in the operation of the company's affairs. Is it to be considered that a party is to be taxed upon his *expenses?* Is a company to be taxed because some of its stockholders have sold their shares to other persons? Is the *business ability* of the officers and employes of a corporation taxable? All the

proceeds of the business *are* taxable in the hands where they are found on tax day. If the company *retains* its income, it is in the form of money or other tangible property, and the *company* must pay the tax. If it *distributes* its income in dividends, then the *stockholders* must individually pay the tax. The *income* from a patent is as taxable as the income from anything else; but neither the thing—the *patent* itself—nor *stock which merely represents it*, can be taxable,—for the reasons already given. Nor, let it be said, do the conditions here furnish any excuse for the complaint that appellee does not contribute its fair share of the public revenues, or that it makes unequal upon the citizens of a State the burdens of taxation. On the contrary, a corporation like this appellee, which owns valuable patents which are used throughout the length and breadth of the country, and which draw to its home office a considerable income from royalties paid by manufacturers in other and distant States, and distributes the funds so collected among stockholders who are citizens of its home State, helps in a large and beneficent measure to furnish taxables which may be levied upon to furnish means to defray the expenses of maintaining the Government. If the contrary doctrine should be held, corporations owning patents as valuable as the officers of this corporation believe their patents to be, would be driven to abandon their corporate home in Indiana, and go where the laws are more friendly, and where the taxing officers have a better appreciation of the benefits such an enterprise confers upon the community in which it is located.

So far as appellee's counsel knows *brains* have never been listed as taxables—and should they be, or should it be held that they impliedly are, it would seem that they should be taxed to the *owner* rather than the hirer.

If appellants' contentions in this case can prevail, then may invention and enterprise well be stayed.

It is true that appellee is the owner of a "franchise"—a ***patent***—granted by the Government of the United States. If it shall succeed in maintaining and enforcing its rights thereunder, then this patent franchise will, as it believes, be of very large value. If it shall fail, said franchise will be absolutely worthless. In the former case it is prosperous, and it is likely to receive a large income,—*which income* ***will be taxable.*** In the latter case it is insolvent, and will become defunct, when it will have nothing to tax.

The justice, therefore, as well as the law of the case, is thought to be clearly with the appellee.

The value of a patent is measured by the income from it. It has no intrinsic value. Its value is solely an earning or income value, and ends with its term. The income when earned and received is taxable,—be the amount large or small,—and no other taxation in any way relating to a patent is lawful.

THE DISTINCTION BETWEEN PATENTS AND PATENTED ARTICLES.

Certain quotations from *Patterson* v. *Kentucky*, *supra*, will serve to bring into strong relief the distinction between the powers reserved to the States as police powers and the powers denied to the States by the Federal Constitution and laws concerning patents.

This case was heard upon writ of error to the Kentucky Court of Appeals, which had affirmed the judgment of an inferior State Court, in which upon indictment and trial a fine of $250 was imposed upon plaintiff in error for a violation of certain provisions of a Kentucky statute regulating the inspection and gauging of oils and fluids such as petroleum, and condemning as unsafe for

illuminating purposes such as ignite or permanently burn below a temperature of 130° Fahr. The oil, which was the subject-matter of the sale complained of, was also the subject of certain Letters Patent of the United States, and the plaintiff in error claimed the right to sell it, therefore, notwithstanding the State statutory police regulation above recited.

This Court held that such a construction of the Constitution and laws of the United States was inadmissible, and said:

> By the settled doctrines of this Court, the police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, *strictly and legitimately for police purposes*, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by necessary implication, to the National Government. The Kentucky statute under examination manifestly belongs to that class of legislation.
>
> . . . . . .
>
> It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of *tangible* personal property which the State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within its limits.
>
> . . . . . .
>
> This court has never hesitated, by the most rigid rules of construction to guard the commercial power of Congress against encroachment in the form or under the guise of State regulations established for the purpose and with the effect of destroying or impairing rights secured by the federal Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations enacted in good faith,

> and which had appropriate and direct connection with that protection to life, health and property which each State owes to its citizens.
>
> . . . . . .
>
> The right which the patent primarily secures is the exclusive right in the discovery, which is an *incorporeal* right, or, in the language of Lord Mansfield, in *Millar* v. *Taylor*, 4 Burr 2303, "a property in notion," which "has no corporeal tangible substance." *The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile State legislation;* but the *tangible* property which comes into existence by the application of the discovery is not beyond the control as to its use of State legislation, simply because the inventor acquires a monopoly in the discovery.

In the case of *Allen* v. *B. & O. R. R. Co.*, 114 U. S. 311, (29 L. ed. 200), this Court, quoting from *Board of Liquidation* v. *McComb*, 92 U. S. 531, declared it to be

> well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and *injunction* are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. ***An unconstitutional law will be treated by the courts as null and void.***

This Court long ago pointed out the distinction between the taxation of a patented article and the taxation of the patent itself, and in dealing with the question Mr. Chief Justice TANEY, speaking for the Court, said:

> The distinction is a plain one. The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States.
>
> . . . . . .
>
> But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no rights created by the Act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee.
>
> . . . . . .
>
> And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress.
>
> . . . . . .
>
> The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the State in which it is situated. . . . . Like other individual property, *it is* ***then*** *subject to State taxation;* and from the great number of patented articles now in use, they no doubt, in some of the States, form no inconsiderable portion of its taxable property.
>
> *Bloomer* v. *McQuewan et al.*, 14 How. 539. (14 L. ed. 532).

The Supreme Court of the State of Michigan, speaking by Judge COOLEY, has expressly recognized and declared that:

> Any State legislation which undertakes to limit or restrict in any manner the privilege which the Let-

> ters Patent confer is an *invasion* of the sphere of national authority, and therefore *void.*
>
> *People* v. *Russell*, 49 Mich. 617.

In this case they cited with approval *Cranson* v. *Smith*, 37 Mich., 309, in which it was said:

> In those cases where the congressional power is lawfully exercised, it is *supreme.*
>
> . . . . . .
>
> The Constitution of the United States not only allows but favors the special protection of inventors. The measure of that protection, and its conditions, can not be fixed by any power but Congress, and the remedy for abuses or defects in the legislation of that body must be found in its own revision of its own laws. It is not competent for State statutes to deal with them or to revise the national policy.

HOW PATENTS ARE "PROTECTED."

At pp. 90–91 of their brief appellants quote from *Crown Cork & Seal Co.* v. *Maryland* to the effect that "patent rights are personal property and entitled to the same protection as other property", citing *Cammeyer* v. *Newton*, 94 U. S. 225, (24 L. ed. 72).

In *Cammeyer* v. *Newton* this Court used the following language:

> Holders of valid letters patent enjoy, by virtue of the same, the exclusive right and liberty of making and using the invention therein secured, and of vending the same to others to be used, as provided by the act of Congress; and the rule of law is well settled, that an invention so secured is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted. *Seymour* v. *Osborne*, 11 Wall. 516, (20 L. ed. 33), 16 Stat. at L. 201.
>
> . . . . . .

Section 22 of the Patent Act provides that every patent shall "contain a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend the said invention or discovery throughout the United States." 16 Stat. at L. 201.

Agents of the public have no more right to take such private property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this Court, in which it is held that the government cannot, after the patent is issued, make use of the improvement, any more than a private individual, without license of the inventor or making him compensation. *U. S.* v. *Burns*, 12 Wall. 246, (20 L. ed. 338).

In *Seymour* v. *Osborne*, cited in *Cammeyer* v. *Newton*, the Court stated the matter as follows:

Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.

Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as *public franchises* granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.

But how is this protection to be had? The Statutes of the United States, Sec. 629, say that the Circuit Courts of the United States shall have jurisdiction:

> *Ninth.* Of all suits at law or in equity arising under the patent or copyright laws of the United States.

And Sec. 711 says:

> Sec. 711. The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be *exclusive* of the courts of the several States:
>
> . . . . . .
>
> *Fifth.* Of all cases arising under the patent-right or copy-right laws of the United States.

As a matter of fact, the *protection* to patent property which the owners of such property invoke is always that provided for by the patent laws of the United States. No State can, will, or even pretends to, in any manner protect patent rights. And if a State protects patented *articles*, it protects them *as articles* merely, and also *taxes* them, as it has a right to do.

WHAT THE RETURNS SHOW.

While these questions seem to have no special bearing upon the controversy here, we now call attention to the disingenuousness of the discussion of the schedules found on pp. 55-60 inclusive of appellants' brief.

Near the top of p. 55 appellants call attention to the fact that the return for the year 1893 showed $33,900 of personal property, utterly ignoring the fact that this includes the returned valuation of $25,000 for the patents, leaving a balance of only $8,900 of taxable property.

It is true, as stated further down on said p. 55, that the company had credits of $24,744. But this is so stated as to attempt to obscure the fact that said credits were more than offset by $25,000 of debts, which, under

the statutes of Indiana, are lawfully deductible from credits. The schedules themselves show this, and these schedules are prescribed by, embodied in and form part of the statutes of the State of Indiana relating to taxation.

These blank forms of schedule are provided for and embodied in Section 53 of the Tax Law of March 6, 1891, being Section 8458 of the revised statutes of 1894, as called to attention in appellants' brief.

The matter in question as to the year 1893 is printed on p. 37 of the transcript of record.

The matter on p. 52 of transcript, called to attention, shows that the indebtedness in 1895 was $39,863 *more* than the total assets, excepting patent rights.

Of the $32,645 returned in 1894, (transcript, pp. 46–49), $25,000 was for patents, leaving a balance of $7,645. This year the company had $15,491 of credits and $50,000 of debts.

In 1895, (transcript, pp. 53–57), the total amount returned was $10,137. This did not include credits of $22,891, (p. 53), which were more than twice offset by $50,000 of debts, (p. 54). This year the company declined to include the patents, but answer (transcript, p. 55): "We are advised that patent rights are not taxable, and, therefore, decline to state any value for them". But the deputy assessor appended a foot note showing the valuation, which, however, of course is not included in the footing of the return.

"EO NOMINE."

At several places in their brief counsel for appellants refer to patents and franchises "*eo nomine*," as though there were some distinction to be drawn by varying nomenclature.

"A rose by any other name would smell as sweet," and we have no apprehensions that this Court will

indulge in any such hair-splitting distinctions. The decisions quoted from at pp. 31-33, *ante*, seem to be conclusive that substance and not mere verbal form is regarded by this Court.

TAXABILITY OF FRANCHISES.

The taxability of "franchises" is sought to be established, and authorities are cited supportive of that proposition. Appellee's counsel deems it no part of his duty to either affirm or deny this proposition generally, for he conceives it to have no proper bearing upon the issues in this case. It may well be that many classes of franchises are taxable. It is notorious that such franchises as are possessed by street railway companies, gas companies, and the like, are of enormous value. In the organization of such companies to operate in cities of importance, an enormous amount of capital must be raised merely to acquire such franchises. In other places where franchises of this character were obtained many years ago for small amounts, recent sales have demonstrated their greatly increased value. These are exclusively municipal affairs, and are under control of State and municipal laws.

Most likely such or similar franchises were in the minds of the court in most of the cases cited by counsel for appellants; or in some cases, perhaps, franchises granted by the States themselves, which, so long as there is no conflict with federal laws, may (so far as any question involved in this case is concerned) be conceded to be within State control and subject to any burdens which may be imposed by the State. But it must be conceded by appellants that where the so-called plenary power of the States comes in conflict with the really plenary power of the United States, then the former must yield; and it is not believed—indeed, the authorities cited by counsel for appellee in his original brief are overwhelm-

ingly to the contrary—that franchises granted by the Government of the United States have ever been successfully subjected to taxation. Should the time arrive when they, without the express permission of the general Government, may be,—then, indeed, States' rights and nullification will hold dominant sway, and the powers of the Federal Government become a myth.

NULLIFICATION.

We have already, on pp. 17 and 18 of this brief, discussed the proposition that a patent is a contract, and have given some authorities upon that point. If this be true, we are confronted by the contention that these appellants are in some way vested with the power to nullify or impair this contract made on behalf of all the people by the Government. Let us examine the question a little further then, and see where, if carried to its logical conclusion, such a contention will lead us.

The Constitution of the United States, Section 10, Article I, says:

> No State shall . . . pass any . . . law impairing the obligation of contracts.

"Law" is a rule of action established by authority.

A rule of administrative procedure uniformly acted on by State officials is a law equally with the statute—differing only in degree—not in kind.

In the present case there is both a statute and an administrative rule, which rule, whatever may be said or pretended to the contrary, is based upon said statute.

The contract in question is of a high character,—being by no less a party than the people of this great nation, acting in their sovereign capacity, who have solemnly granted the rights in question for a consideration.

One of the questions here raised is, shall this State statute and this administrative rule be permitted to impair the obligation of this contract by imposing the additional obligations not called for by the contract itself, or by the Constitution or the statute of the United States under which the contract was entered into?

The second paragraph, Article VI, of the Constitution says:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Possibly in this matter we are traveling in a circle; but the proposition may, perhaps, be lent a new emphasis by the inquiry: Is a State or County Board of taxing officers to be permitted to nullify (or annex any conditions to) a contract made by the whole people of this great country through their duly chosen and legally authorized representatives?

No Court has ever decided the affirmative of the proposition which appellants' contention resolves itself into. It remained for the predecessor of my present opponent, who, by the chance of politics, became the Attorney-General of the State of Indiana, and who by means of his aggressive manners and egoistic personality succeeded in dominating our rather mild and timid Governor, and other State officials, to seriously contend for a proposition so absurd.

> But no one in this country, however exalted in station or illustrious in character, is above the law. No State official can, in assuming the name of the State, shelter himself behind her sovereign immunity.
>
> *Southern Ry. Co.* v. *North Carolina Ry. Co.*, 81 Fed. Rep. 595.

So here we are, and the result is that this Court is troubled to decide a question which it seems to us ought never to have been raised.

It has been said that the Government of the United States has no interest in protecting its Letters Patent, or in seeing that its patentees are sustained in their rights thereunder. Startling proposition! That this great Government—"of the people, by the people, for the people"—has no interest in the honest execution of its contracts—because, forsooth, its statutory fees having been paid, under proceedings which resulted in the grant, there is no further direct pecuniary return to the Treasury.

As well might the gentlemen say that this great Court, organized for the purpose of seeing that justice be done, has no interest in the proper determination of such cases brought before it as do not affect your Honors' salaries, or the public revenues.

To these lengths would such a theory, if pursued to its legitimate conclusion, lead us. We protest against anything tending in such a direction.

If we are to be defeated here, let it not be for any such reasons or upon any such grounds. Appellee, at least, will not seek to so demean this case. Believing itself morally as well as legally in the right, it comes here with every confidence that its contentions will be upheld; but should we perchance be mistaken in the law, we feel confident that an adverse decision, if one be rendered, will be because it is found to be the law, and not because this great Government has no regard for the proper execution of its contracts.

A Canadian authority states the matter admirably:

> It is universally admitted in practice, and is certainly undeniable in principle, that the granting of Letters-Patent to inventors is not the creation of an

unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favor; but a *contract* between the State and the discoverer.

. . . . . .

Invention being recognized as a property, and a ***contract*** having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal [literal] interpretation of the terms of the contract, interpose, *the patentee's rights ought to be held as things which are not to be trifled with, as things sacred in fact,* ***confided to the guardianship and to the honor of the State and of the courts.***

Barter v. *Smith*, 2 Exch. Rep. of Canada, 455, at pp. 477–478.

While the fact has not much bearing upon the present case, it may be well enough to state that patents are not such monopolies as are opposed to the policy of the law, as is established by the following authorities:

Allen v. *Hunter*, Fed. Cas. No. 225.
Atlantic Works v. *Brady*, 107 U. S. 203.
Stevens v. *Keating*, 2 Webs. Pat. Cas. 181.
WALKER on Patents, Sec. 152, p. 131.
Seymour v. *Osborne*, 11 Wall. 516.
CURTIS' Law of Patents, preliminary observations.

WHAT IS BEFORE THIS COURT.

Near the conclusion of his elaborate and highly ingenious brief, the Attorney-General of the State of Indiana propounds the inquiry:

> But how is this court going to ascertain from the record the valuation of the patents in question? By what sort of process is the court to ascertain just how much of the $20,000 assessment in 1892, and of the $36,000 in 1893, and the $36,000 assessment in 1894, and again in 1895, is made up of the value of the patent rights held by the company?

And proceeds to tell us again that the defendants have said, under their "oath", that they did not assess these patents at all, thus apparently attempting by endless iteration to cause us to lose sight of the fact that the "oath" in question is a mere voluntary, uncalled-for, extra-judicial proceeding, lugged into the record without warrant or justification. And this, according to appellants' counsel, is not only to take the place of evidence, in despite of the rule established by this court concerning this subject, but is to overthrow evidence regularly taken, in due course, with counsel for both sides present, and where the witnesses were subject to cross-examination. *Exparte* and unauthorized "oaths", if this contention is successful, will hereafter, it is needless to say, form a convenient and highly desirable substitute (by means of which the danger of having to answer embarrassing questions may be avoided) for the procedure until now regarded as essential to the ends of justice.

It is said that the appellee's president *estimates* the stock as being worth par; but it is equally true that he has testified, in the most positive manner, that its *entire* value resides in the patent rights which it represents. This is the fact. It is the truth. And this truth is as clear from this record as the noonday sun. And elaborate and learned disquisitions upon the law of taxation

can not obscure this truth. It seems wholly unnecessary to follow the Attorney-General through the many and intricate legal ramifications which he has presented to the Court. This case ought not, in appellee's counsel's opinion, to be determined upon any such considerations. The authorities do not, in his opinion, apply. On the contrary, those heretofore cited in this brief apply, if indeed citation of authorities is necessary.

However, answering the Attorney-General's inquiry directly, we say:

This court is not called upon to ascertain the "valuation" at all; or to determine whether or not the patents have any value. The point to be determined is whether or not the patents are taxable at all.

It seems clear that they are not—directly or indirectly—for the reasons which have been given.

Repeating the statement made at the beginning:

The tax complained of is all wrong or all right. If patents are taxable we make no complaint concerning the valuation.

CONCLUSION.

Much of appellee's argument in this case is devoted to traversing propositions, advanced by appellants, which appellee believes to be outside the issues of the case, but which nevertheless have been discussed for the purpose of showing that, even upon such issues, the right and justice of the controversy are with the appellee. If the Court shall adopt appellee's views, it will, of course, ignore these matters in making its decision.

The real issue is, as appellee conceives it: Did appellants tax (or attempt to tax) appellee's patents, directly or indirectly? Appellants' contention is that the tax was levied, not upon appellee's patents, but upon its stock. Appellee replies that its stock was issued for these patents, and for nothing else but the patents, and is merely the *representative* of the patents, and that any tax upon the stock is, therefore, a tax upon the patents—indirect if you will,—but no less truly.

It may be that these taxing officers have a right under some circumstances to tax capital stock. Appellee conceives it to be unnecessary to discuss that question. They may, and probably can, lawfully tax some classes of franchises, but it seems equally unnecessary to discuss that proposition. They cannot, however, tax franchises granted by the Government of the United States in the exercise of its "paramount sovereignty".

No amount of lawfulness of *method* can give vitality to *void proceedings*. No multitude of authorities, being cases where there was a valid foundaton for an action, can support a proceeding where there was no lawful foundation. No State statutes; no tribunals established under them; no obscuration of issues, or elaboration of matters not properly in issue; no "ingenuity of argumentation," can ever establish in State or municipal authorities, so long as the Constitution and laws of the United

States remain as they are, the right to tax Letters Patent of the United States.

Nor, so long as courts of justice follow established rules, can any *indirect* method, however skillfully conceived, or however powerfully supported, require, or it is believed will induce, a court, especially a court of equity, to pronounce lawful, that which when attempted by direct methods must be pronounced unlawful.

The matter may be summarized as follows: The taxing officers of the state of Indiana require of appellee a return for taxation in a certain form, and furnish the blank forms for such return. Appellee complied with these requirements, and furnished the returns under oath, showing fully and fairly the property of which it was possessed. That property consisted almost exclusively of "patent rights" or Letters Patent of the United States. The correctness of these returns has never been called in question or disputed or attacked in any way. In addition to these returns, which were introduced in evidence in this case in the Circuit Court, testimony was taken of the present and past officers of the company, and this all showed that the entire capital stock was actually issued for and used in the purchase of these Letters Patent or patent rights, and for nothing else. The testimony further showed that except for the value of these Letters Patent or patent rights appellee would be wholly and hopelessly insolvent, and that it had no other property of any name or description, save the moderate amount which was returned for taxation, and on which as the evidence shows all taxes due had been fully paid.

Notwithstanding all these facts appellants assumed a sheerly capricious right to ignore these duly verified and uncontradicted statements invited by them and received by them in the course of their duty, although

there was before them neither evidence nor fact to the contrary, and to levy and assess upon appellee's stock which was issued for nothing and represented nothing but its Letters Patent or patent rights, the taxation complained of.

This Court, by Mr. Chief Justice MARSHALL, has declared:

> **All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.**
>
> *McCulloch* v. *Maryland*, 4 Wheat. 429. [4 L. 607.]

The finding of the Circuit Court for the District of Indiana was as follows:

> The Court finds the facts set forth in the complainant's bill of complaint to be true and proved: A decree may be prepared adjudging for plaintiff as prayed and also to embody a perpetual injunction against defendants as prayed, with costs to be taxed against them.

It is respectfully submitted that this finding was correct; that the decree entered under it was a proper one, and that said decree should be affirmed—or the appeal dismissed—at appellants' costs.

CHESTER BRADFORD,
Solicitor and Counsel for Appellee.

INDIANAPOLIS, October 23, 1899.

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No. 30.

Brf. of Bradford & Smith for Appellee on Jurisdiction.

Filed Dec. 30, 1899.

IN THE Supreme Court of the United States.

On Appeal from the U. S. Circuit Court for the District of Indiana.

STERLING R. HOLT, *et al.*,
Appellants,
vs.
THE INDIANA MANUFACTURING COMPANY,
Appellee.

No. 30.
IN EQUITY.
October Term,
1899.

BRIEF FOR APPELLEE
ON
JURISDICTION OF CIRCUIT COURT.

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The rights of patent owners cannot be invaded or their patent property appropriated by a Government more than by an individual.

United States v. *Burns*, 12 Wall. 246.
Cammeyer v. *Newton*, 94 U. S. 225.
James v. *Campbell*, 104 U. S. 326.
United States v. *Palmer*, 128 U. S. 262.

(p. 14, *post*.)

The degree or kind of invasion is immaterial. To appropriate such rights for public use by way of taxation, is exactly the same thing as to appropriate said rights for use upon or incorporation into some public work.

Taxation under the Indiana enactment is therefore an attempt by the State of Indiana to appropriate private property for public use without compensation, and is in violation of the Constitution of the United States, and a deprivation of rights guaranteed by the Constitution and laws of the United States.

Suits to redress such wrongs are cognizable in the Courts of the United States without reference to the amount in controversy.

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IN EQUITY.
October Term, 1899.

BRIEF FOR APPELLEE ON JURISDICTIONAL QUESTIONS.

May it please the Court:

In accordance with the leave granted December 20, 1899, the following brief is submitted upon the question of whether or not the decision and decree of the Circuit Court should be reversed and the cause remanded with directions to dismiss the bill for want of jurisdiction.

It may be premised that while the *amount* in controversy in the present case is comparatively small, (the principal sum involved amounting to approximately $1,700.00,) the *question* is enormously important; and affects many thousands of inventors and owners of patent property throughout the United States, as well as all State taxing authorities.

It seems, therefore, that the case is one of large public interest, and if it is possible for the question to be disposed of at this time it would seem highly desirable that it should be done, rather than that it should be immediately re-litigated and eventually returned here in a case differing merely in the monetary amount involved, as is inevitable if this case fails.

This question, stripped of immaterial technicalities, is: **Can a State under laws enacted by it tax Letters Patent for inventions issued by the United States under its Constitution and Laws?**

This suit was begun to redress the deprivation under color of a law of the State of Indiana of rights, privileges or immunities secured to appellee under the Constitution and Laws of the United States: To prevent the State of Indiana through its officers from depriving appellee of its property without due process of law: And to secure to appellee the equal protection of the laws, which the State of Indiana, through the appellants, its officers and agents, was seeking to deprive them of.

In other words, appellee sought to maintain its rights, privileges and immunities under the patent laws of the United States, which rights, privileges and immunities were being invaded by the State of Indiana, or by appellants in their capacities as taxing officers under color of the Indiana statutes requiring the taxation of patents.

> If a State law is in conflict with the Constitution of the United States, and a State officer is about to execute it, *this would be a proper case for the exercise of the jurisdiction of the Circuit Court to restrain him.*
>
> GARLAND and RALSTON'S Federal Practice, p. 163.

The statutes of the State of Indiana respecting taxation are comprised in the Act of the General Assembly approved March 6, 1891, which, by Sec. 50, requires that:

> Every person required by this act to make or deliver such statement or schedule shall set forth an account of property held or owned by him, as follows:
>
> . . . . . .
>
> *Seventh.* All **PATENT RIGHTS** describing them, and giving the number of each patent, and the value of each.

In Sec. 53 of the same Act we find a form of "Schedule" prescribed, in which occurs this item:

"25 | Number of **PATENT RIGHTS** and value . . . | . . | . . . ."

The State of Indiana, therefore, in and by its statutes, attempts to tax "patent rights".

Appellee's contention is that ***a State can have no control over a franchise granted by the government of the United States,*** and that State Statutes prescribing the taxation of Letters Patent, are in conflict with the laws and paramount sovereignty of the United States, and are therefore **VOID.**

The jurisdiction of the Circuit Courts of the United States to entertain and determine such cases seems clear, and is supported by many considerations. Among their sources of authority is Sec. 629 of the Revised Statues. The jurisdiction of these courts in cases like that at bar seems to be expressly provided for by the ninth and sixteenth clauses of this section, which clauses read as follows:

> NINTH. Of all suits at law or in equity arising under the patent or copyright laws of the United States.
>
> . . . . . .
>
> SIXTEENTH. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege,

> or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

The act of March 3, 1875, as amended March 3, 1887, and corrected August 13, 1888, amends or supersedes the first and some other clauses of Sec. 629.

It is not seen, however, how this affects or limits either the ninth clause or the sixteenth clause.

The original *first* and *second* clauses were those in which a monetary or subject-value limitation upon the jurisdiction of the Court was prescribed, and it seems clear that under said original section no such limitation applied to either the *ninth* or the *sixteenth* clauses; and when the clauses containing such monetary or subject-value limitation were amended or superseded, no reason can be seen why such limitation should be extended to apply to the clauses to which it had not theretofore extended.

This Court has passed upon this matter, as appellee's counsel understands it, when it said:

> To sustain the contention of the plaintiffs, we must hold that the purpose of section 1 of the Act of March 3, 1875, was to repeal by implication and supersede all the laws conferring jurisdiction on the circuit courts, and of itself to cover and regulate the whole subject. But this construction would lead to consequences which it is clear Congress did not contemplate. All the laws in force December 1, 1873, prescribing the jurisdiction of the circuit courts were reproduced in section 629 of the Revised Statutes, and the jurisdiction was stated under twenty distinct heads, eighteen of which had reference to the jurisdiction in civil cases. In sixteen of these eighteen

heads the jurisdiction is conferred without reference to the amount in controversy.

. . . . . .

The Act of 1875 confers jurisdiction on the circuit courts only in cases where the matter in dispute exceeds $500. If that Act is intended to supersede previous Acts conferring jurisdiction on the circuit courts, then those courts are left without jurisdiction in any of the cases above specified where the amount in controversy does not exceed the sum of $500.

. . . . . .

The Act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects.

. . . . . .

Its purpose was to give to the circuit courts a jurisdiction which the federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature at common law or in equity, and not to take away from the circuit or district courts jurisdiction conferred by prior statutes.

United States v. *Mooney*, 116 U. S. 104 (29 L. ed. 550.)

The Acts of March 3, 1887, and August 13, 1888, raised the amount to $2,000, but are otherwise merely amendatory and corrective in phraseology of the Act of March 3, 1875.

Clause *nine* has been expressly held not to be affected, (*Re Hohorst*, 150 U. S. 662); and no more reason can be seen why clause *sixteen* should be affected.

Repeals by implication are not favored, and these clauses of the statute must stand unless in irreconcilable conflict with the later act.

Sec. 5 of the Act of March 3, 1887, expressly provides that the laws concerning what are known as "civil rights", shall not be repealed or affected by anything contained in said act.

Sec. 711 Revised Statutes reads in part as follows:

> SEC. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:
>
> . . . . . .
>
> FIFTH. Of all cases arising under the patent-right or copyright laws of the United States:

It may be further said that it would be anomalous if a monetary limitation was put upon cases in the Circuit Courts where no such limit was put upon the same cases upon appeal to this Court. Appeals to this Court in such cases were provided for in Sec. 699, R. S., which reads, in part, as follows:

> SEC. 699. A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, *without regard to the sum or value in dispute:*
>
> FIRST. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the supreme court of the District of Columbia, or of any Territory, in any case touching patent-rights or copyrights.
>
> . . . . . .
>
> FOURTH. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States.

The provisions respecting appeals to this Court have been, at least to some extent, superseded by the Act of March 3, 1891, by which jurisdiction is given to Circuit Courts of Appeals in many cases, including all ordinary appeals in patent cases; but jurisdiction is reserved to

this Court in any and all cases involving "constitutional questions", as appears by Sec. 5 of said Act, which in-so-far as applicable to the case at bar reads as follows:

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> . . . . . .
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> . . . . . .
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

No monetary or subject-value limitation is placed upon such appeals, and the obvious intention of Congress, as evidenced by this latest legislative expression, was that such cases should be classified by their public interest and importance, and not by the amount of money involved.

Appellants took their appeal under the last above-quoted law.

This is a case arising under the Constitution and Laws of the United States, and from its nature ought to be, and it seems must be, cognizable in a federal court.

Sec. 2. Article III, of the Constitution reads in part:

> The judicial power shall extend to ***all*** cases, in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

It would seem that if *any* statute is designed to limit the judicial power *in such cases* by any monetary consideration such statute is itself (to that extent) opposed to the Constitution and therefore inoperative.

Section 1 of the Fourteenth Amendment to the Constitution reads, in part, as follows:

> SECTION 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This applies to corporations:

Railroad Tax Cases, 118 U. S. 394, (30 L. ed. 118.)

In attempting to collect taxes upon Letters Patent of the United States, the State of Indiana, through appellants, was seeking to deprive appellee of its property without due process of law. The statute of the State of Indiana under which appellants were proceeding is believed to be—and has been held to be by the Circuit Court from which this appeal was taken—"unconstitutional, invalid, and void". (Transcript, p. 16.)

In proceeding as they did, therefore, they were law breakers under the Constitution and Laws of the United States—to *all* cases whereunder, according to Sec. 2 of Article III, the judicial power of the United States extends.

> An unconstitutional law will be treated by the courts as null and void.
>
> *Allen* v. *B. & O. R. Co.*, 114 U. S. 311, (29 L. ed. 200).

The taxation complained of was clearly an attempt on the part of the taxing officers against whom this suit was brought (1) to deprive the appellee of its property without due process of law, and (2) to deny appellee the equal protection of the laws.

(1). To seize and distrain property for an illegal tax levied by an inferior power in express violation of the

laws enacted by the sovereign power is certainly to deprive the party taxed of its property without due process of law.

(2). To attempt to assess a corporation—an artificial person—in a manner other than that which is employed in assessing other persons is to deny to it the equal protection of the laws.

Here we have a case where the appellee, owning patents, for which all its shares of stock, according to the evidence, were solely issued, and which patents therefore constitute its capital, upon which the tax is attempted to be laid, when in the case of an individual owning the same property no such attempt would or could be made. This upon the hypothesis urged by appellants that they were not attempting to tax the patents directly; not that there is any merit in such a contention, which is simply a variation of the shifty plan adopted by appellants to evade the real issue.

There is no question of citizenship involved in this case. The jurisdiction of the Circuit Court, if any, depends upon the right of appellee to bring and prosecute this suit because the controversy arises under the Constitution and Laws of the United States.

The question presented to the Court is whether the statute of the State of Indiana authorizing the taxation of patent-rights is in conflict with the Constitution of the United States. *This statute selects patent-rights as the subject of taxation* without federal authority. Such property is not subject to taxation by a State, and any law of the State selecting it for taxation violates the Constitution, and thereby denies to appellee the due process of the law and the equal protection of the laws. An unconstitutional law is no law; and no person or officer can acquire rights to perform duties under it. To

lay a tax upon appellee's property without a law authorizing it to be done, would be an exercise of an unwarranted authority, and the taking of property without due process of law, and a clear and undeniable violation of the Constitution of the United States.

In such a case, it is respectfully submitted, a person is not denied the jurisdiction of the Courts of the United States simply because the amount of money involved does not exceed two thousand dollars. It is sufficient that there has been an enactment by the legislature of the State which is in violation of the Constitution of the United States, and that some one under color of its authority is seeking to enforce such unconstitutional enactment against appellee or his property. In every such case the person aggrieved may appeal to the Courts for the protection of his rights under this constitutional guaranty. In all such cases the United States Circuit Court has original jurisdiction.

In such a case a correct decision would depend upon a proper construction of the Constitution, and this would give the proper Circuit Court jurisdiction.

In the case of *Starin, et al.* v. *New York City*, 115 U. S. 248, (29 L. ed. 388), this Court stated the rule, and collated the authorities, as follows:

> The character of a case is determined by the questions involved. *Osborn* v. *Bank of U. S.*, 9 Wheat. 824. If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia*, 6 Wheat. 279; *Osborn* v. *Bank of*

United States, 9 Wheat. 824; *The Mayor* v. *Cooper*, 6 Wall, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 201; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 140; *Ames* v. *Kansas*, 111 U. S. 462; *Kansas Pacific* v. *Atchison R. R. Co.*, 112 U. S. 416; *Providence Savings Soc.* v. *Ford*, 114 U. S. 641; *U. Pacific R. R. Removal Cases*, 115 U. S. 11.

Appellee also contends that this is a suit "arising under the patent-right . . . laws of the United States" as the same are designated in Secs. 629 and 711 Revised Statutes.

The bill of complaint alleges the facts quite fully, and, it is believed, shows unquestionably that the tax was upon the Letters Patent and in violation of the Constitution and Laws of the United States.

For convenience the allegation respecting the taxes for one year (1893) is here reproduced as follows:

> Your orator further shows unto your Honors that at the time for assessing taxes for the year 1893 it had and was possessed of tangible property to the extent of $8,900, and no more, and that it made due return of the same for taxation upon and by means of the **regular statements and assessment lists furnished for that purpose by the Assessor,** as by a duly authenticated copy of said statement and of said assessment list ready here in Court to be produced whenever required will more fully and at large appear. That the **Assessor demanded** of your orator that the **number and value of Letters Patent owned by your orator should be furnished to be placed upon said assessment list,** which said demand your orator submitted to, for the purpose of furnishing the said Assessor the information which he desired, and thereupon **said assessment list was was made to show and does show that your orator was at that time possessed of four**

Letters Patent of the United States of the value of $25,000; but your orator denies that by furnishing the information aforesaid it admitted or agreed to the legality of assessing **Letters Patent** for taxation, or the validity or propriety of such assessment; and it now avers that **it denies and always has denied the validity or legality of such or any assessment on account of any Letters Patent owned or held by it.**

Your orator further shows unto your Honors that the Board of Review, composed of the said Joel A. Baker, Thomas Taggart and Victor M. Backus, did inequitably, wrongfully, unlawfully and injuriously fix the assessment of your orator's property for purposes of taxation **because of your orator's ownership of said Letters Patent as aforesaid,** at the sum of $36,000, or $27,100 more than your orator was properly assessable for, all in violation of the Constitution and laws of the United States, and in defiance of your orator's rights in the premises. Your orator further shows unto your Honors that it has paid as taxes for the year 1893 the sum of $204.55 to the said Sterling R. Holt, Treasurer, as aforesaid, and holds his official receipt therefor, which said receipt is ready here in Court to be produced whenever required; which said sum of $204.55 is in full of all taxes, with penalties, interest and costs thereon, which were justly and lawfully chargeable to your orator for the said year 1893, and is **in full of all taxes levied or assessed upon all and singular its property and assets of every description, saving and excepting only the said Letters Patent of the United States.** Notwithstanding which the said defendants, and particularly the said defendant, Sterling R. Holt, as Treasurer, as aforesaid, are demanding a further large sum, to-wit: the sum of $464.94, as unpaid taxes for the said year 1893, **basing said demand upon the valuation of the Letters Patent of the United States as above set forth, and**

> **not otherwise;** and are threatening to levy upon and seize and sell the property of your orator to pay the taxes so unlawfully and unjustly demanded; all **in violation of the Constitution and Laws of the United States,** and to the wrong and injury of your orator.

Section 8 of Article I of the Constitution of the United States, enumerating the powers of Congress, includes that:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries.

In pursuance of the authority thus given, Congress has enacted laws under which Letters Patent for new inventions are granted to inventors or their assignees:—and that section pertinent to the present inquiry reads in part as follows:

> SEC. 4884. Every patent shall contain . . . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the *exclusive* right to make, use, and vend the invention or discovery throughout the United States and the territories thereof.

Quoting from the grant forming part of one patent so issued, we find that the form adopted agrees with the Constitution and the statute:

> Now therefore these LETTERS PATENT are to grant unto the said The Indiana Manufacturing Company, its successors or assigns for the term of seventeen years from the twenty-seventh day of March, one thousand eight hundred and ninety-four, the **exclusive** right to make, use and vend the said invention throughout the United States and Territories thereof.

It will be observed that the word used in the Constitution, in the Act of Congress, and in the Patent itself, is the word "EXCLUSIVE". A patent is a

franchise,—an ***exclusive*** franchise,—to the inventor or his assignee. It is his under the Constitution and Laws of the United States, to enjoy freely and, like other franchises granted by the General Government, without any burdens or restrictions except such as are or may be prescribed in and by said Constitution and Laws. Certainly such a franchise can not be subjected to the burdens of State or municipal taxation.

In other words, the Constitution and the statute gives an *exclusive* right to the invention or discovery, *no more to be invaded by a State, or for governmental purposes, than by an individual, or for private purposes.*

It has frequently been decided that a government officer acting in the interest of the Government has no right to infringe Letters Patent, and that the Government can not make unlicensed use of a patented invention.

In *United States* v. *Burns*, 12 Wall. 246, (20 L. ed. 388) this Court said:

> The Government can not, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him.

In *Cammeyer* v. *Newton*, 94 U. S. 225 (L. ed. 72) this Court further said:

> Agents of the public have no more right to take such private property than other individuals under that provision, [Sec. 4884] as it contains no exception warranting any such invasion of the private rights of individuals.

James v. *Campbell*, 104 U. S. 326, (26 L. ed. 786), and *United States* v. *Palmer*, 128 U. S. 262, (32 L. ed. 442) are to the same effect.

It would seem, therefore, that the question of whether or not a Government or its agents can invade the rights of patentees has been abundantly settled.

It seems as little open to doubt that the *fact* of invasion can not be changed or affected by the matter of *degree*. If the government of a State, through its agents, may not seize upon *one* portion of the patent privilege, for use, for example, in building a state house;—then it may not seize upon *another* portion of the patent privilege, (by way of taxes) to help it pay, for example, for a state house.

This taxation against which this proceeding was directed is in an entirely proper (even if somewhat unfamiliar) sense an *invasion* or **infringement** of the rights secured by the patent laws of the United States.

IMPAIRMENT OF CONTRACTS.—NULLIFICATION.

This suit arises under the Constitution and Laws of the United States because of another consideration.

The Constitution, in Sec. 10, Article I, says:

> No State shall . . . . . pass any . . . . . law impairing the obligation of contracts.

A patent is a contract, existing between the inventor on the one hand, and the general public on the other; and is entered into under the Constitution and Laws of the United States. The consideration to the inventor is a temporary monopoly. The consideration to the public is the clear disclosure of the invention, and its free use when the monopoly—or patent—has expired.

Whitney v. *Emmett*, Baldw. 303; 1 Robb Pat. Cas. 567; Fed. Cas. No. 17,585.

Kendall et al. v. *Winsor*, 21 How. 322. (16 L. ed. 165.)

A Canadian authority states the matter admirably:

> It is universally admitted in practice, and is certainly undeniable in principle, that the granting of Letters-Patent to inventors is not the creation of an unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favor; but a *contract* between the State and the discoverer.
>
> . . . . . .
>
> Invention being recognized as a property, and a ***contract*** having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal [literal] interpretation of the terms of the contract, interpose, *the patentee's rights ought to be held as things which are not to be trifled with, as things sacred in fact,* ***confided to the guardianship and to the honor of the State and of the courts.***
>
> *Barter* v. *Smith*, 2 Exch. Rep. of Canada, 455, at pp. 477–478.

"Law" is a rule of action established by authority. A rule of administrative procedure uniformly acted on by State officials is a law equally with the statute—differing only in degree—not in kind.

In the present case there is both a statute and an administrative rule, which rule, whatever may be said or pretended to the contrary, is based upon said statute.

The contract in question is of a high character,—being by no less a party than the people of this great nation, acting in their sovereign capacity, who have solemnly granted the rights in question for a consideration.

One of the questions here raised is, shall this State statute and this administrative rule be permitted to impair the obligation of this contract by imposing the additional obligations not called for by the contract itself, or by the Constitution or the statute of the United States under which the contract was entered into?

The second paragraph, Article VI, of the Constitution says:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Possibly in this matter we are traveling in a circle; but the proposition may, perhaps, be lent a new emphasis by the inquiry: Is a State or County Board of taxing officers to be permitted to nullify (or annex any conditions to) a contract made by the whole people of this great country through their duly chosen and legally authorized representatives?

To permit states or municipalities to levy taxes upon these contracts would ***impair*** the obligations which have been entered into by the Government, on behalf of the people, with the inventor or his assignee.

Moreover "the power to tax involves the power to destroy."

> *McCulloch* v. *Maryland*, 4 Wheat. 316, (4 L. ed. 579.)

It is impossible to suppose that even the "power" resides in a State to *destroy* a franchise granted by the General Government. States can impose no restriction whatever in respect to Letters Patent of the United States,—much less destroy them.

> *Castle* v. *Hutchison*, 25 Fed. Rep. 394.

The statute of the State of Indiana selecting patent-rights for taxation is "in contravention of the Constitution of the United States", in that part wherein it forbids the passage of any law impairing the obligation of contracts, and the attempt to enforce said statute was

an attempt to deprive appellee of its property without due process of law, and to deny to appellee the equal protection of the laws.

The foregoing considerations seem conclusive: Should the Court, however, determine otherwise, so that the merits of the case shall not be reached, then attention is again respectfully urged to the consideration that the appeal was not taken in time, as presented on pages 41 to 47 of the main brief, which pages are appended hereto, so that the Court may more conveniently refer thereto, if it shall see fit.

It is respectfully submitted that the suit was properly brought in a Court having full jurisdiction, and that the cause should go to full hearing in this Court, or the decision below affirmed without further hearing, or the appeal dismissed—at appellants' costs.

CHESTER BRADFORD,
Solicitor for Appellee.

ALONZO GREENE SMITH,
of Counsel.

INDIANAPOLIS, IND., December 26, 1899.

WAS THE APPEAL TAKEN IN TIME.

In this case we seem also to be confronted with the question of whether or not the appeal is a proper and lawful one.

This question was attempted to be raised by a motion to dismiss, which the Court denied; without, however, filing any opinion. But, as counsel is informed that the Court sometimes considers it best to postpone the consideration of such questions until the hearing, and therefore denies such motions previously made the question is now again raised for such consideration as the Court may see fit to give it.

The judgment and decree of the Circuit Court of the United States for the District of Indiana, appealed from, was made and entered March 3, 1896, as appears on pages 16 and 17 of the printed transcript of record.

The appeal was prayed September 16, 1897, and the same was perfected, by the taking and approval of the appeal bond, September 30, 1897, as appears on pages 17 and 18 of the printed transcript of record. No steps were therefore taken in the matter of said appeal until more than one year and six months after the date of the final decree in the Circuit Court.

The law respecting appeals of this character is found in the Act of March 3, 1891, generally known as the "Evarts Act", (Supplement to R. S., Chap. 517, p. 901) and the title, and those portions of said Act which are believed to have a bearing upon the present matter, read as follows:

AN ACT to establish Circuit Courts of Appeals, and to *define and regulate in certain cases the* ***jurisdiction*** *of the Courts of the United States*, and *for other purposes*.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts.

But all appeals by writ of error [or] otherwise, from said district courts shall *only* be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, *as is hereinafter provided*, and the review, by appeal, writ of error, or otherwise, from the existing circuit courts shall be had *only* in the Supreme Court of the United States or in the circuit court of appeals hereby established *according to the provisions of this act* regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

. . . . . .

In any case that involves the construction or application of the Constitution of the United States.

. . . . . .

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

. . . . . .

SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.

. . . . . .

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

. . . . . .

SEC. 14. . . . . And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

This Court undoubtedly has jurisdiction of the *question* involved in this case, but it is respectfully submitted that it has no authority to hear and determine the *case* itself, for the reason that the appeal was not taken within the statutory time.

Appellee is of the opinion that this Act of March 3, 1891, in and by the provisions above quoted, repeals and supersedes, at least in so far as it governs the time within which an appeal may be taken is concerned, Sec. 1008 Revised Statutes; and that, under the law as it now stands, no appeal can lawfully be taken to this Court, "unless within one year after the entry of the order, judgment, or decree sought to be reviewed".

It may be said, by way of argument, that it seems to have been the policy of Congress in passing the Act in question, to shorten the time within which appeals might be taken, and so speed the final disposition of litigation in Federal Courts. In the same Act the time for taking appeals to the Circuit Courts of Appeals is fixed at six months, whereas (under Sec. 635 R. S.) appeals from District Courts to Circuit Courts could formerly be taken within one year. It would therefore seem to have been the intention to cut down the time within which appeals might be taken one-half in all cases—from two years to one year in cases appealable to the Supreme Court, and from one year to six months in cases appealable from the inferior to the intermediate Courts.

It may additionally be said that no reason can be seen why two years should be allowed for the taking of appeals to this Court from District and Circuit Courts, when only one year is allowed for the taking of appeals to this Court from the Circuit Courts of Appeals, which are the Courts of greater dignity and consequence. To give the law any other construction than that herein contended for, would therefore seem to involve an inconsis-

tency, as well as a departure from what appellee believes to be its plain letter.

The whole Act of March 3, 1891, from and including its title to the end thereof, should, it seems, be considered together, and all the sections and parts of sections relating to the question at issue be given their due and proper force and signification, so that the decision should turn, not upon isolated words or short phrases, but upon the whole law so far as it relates to the question raised.

Sec. 1008 R. S. is repealed by this Act,—not "by implication", but by the express language thereof.

By Sec. 14 all Acts and parts of Acts inconsistent with the provisions contained in Secs. 5 and 6 relating to appeals or writs of error, are *expressly* and *in terms* repealed. And Sec. 1008 R. S. which gives two years for an appeal to be taken to this Court, seems clearly inconsistent with the provisions of this Act which reduce the time to one year.

Nor is there anything inconsistent (supposing that to be the rule which is by no means clear, but which it is not necessary to here discuss) in allowing two years for an appeal from or writ of error to the Supreme Court of a State, where cases from such Courts are reviewable here. The matters which come from State Supreme Courts are usually matters of considerable magnitude, and frequently very complex; and they come much less frequently than cases from inferior Federal Courts. Possibly, also, State Court practitioners should be given more time within which to consider federal questions, than practitioners whose business is principally in the Federal Courts. It certainly involves no inconsistency if the practice be differently regulated. Whether it is or not, however, does not seem to be presented in the present proceeding.

Proceeding now to a little more particular discussion of the questions raised: The Act in question clearly was not exclusively for the purpose of creating United States Circuit Courts of Appeals, but in a large measure was amendatory of the law respecting the *jurisdiction* of United States Courts generally, while its title is broad enough to cover these and many "other purposes".

First, it may be asked, why should Congress have been particular to say "according to the provisions of *this* Act," if it had been intended that appeals from Circuit Courts to this Court might be taken under the provisions of some other act or statute?

And why, as appears in the quotation from Sec. 6 of said act, should Congress say: "In ***all*** cases", etc., and "But ***no*** such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed", if it had been intended that appeals might in *some* cases be taken within two years?

It is believed that appellee's theory of the policy of Congress in enacting this law is also strengthened by the provisions of Sec. 10, wherein it is provided that cases after review and determination in this Court shall take exactly the same course when they come from the Circuit Courts of Appeals as when they come from the District Courts or existing Circuit Courts.

In fact, the whole policy of the law seems to be to the effect that *all* appeals from lower Federal Courts to this Court should be taken in the same time, under the same rules, be determined in the same way, and disposed of in like manner;—and this seems right and reasonable.

Indeed, there can be no argument based upon reason why a litigant should be given two years within which to come to this Court from a Circuit or a District Court.

when he is given only one year within which to come from a Circuit Court of Appeals.

But, to repeat: The law says "In *all cases* not hereinbefore in this section made final." Not as appellants would seem to contend, "In *all cases in which appellate jurisdiction is primarily in the Circuit Court of Appeals*, and not hereinbefore in this section made final." And not "In *some cases* not hereinbefore in this section made final."

And the law further reads "***no*** such appeal;" not "no appeal from a Circuit Court of Appeals," and not "some such appeals."

Indeed, the language used seems entirely plain and clear, and hardly needs definition.

The law in question, like others, should be construed as a whole.

So construed, we submit that it forms a complete and harmonious system in respect to the matters therein comprehended. Under the system thus established this appeal seems not to have been taken in time.

Sec. 14 of this act does not alone repeal Sec. 691 R. S. After doing this it proceeds:

> *And* ***all acts*** *and parts of acts* relating to appeals . . . . . review by appeals . . . . . *inconsistent with* the provisions for in the preceeding *sections five and six of this act* ***are hereby repealed.***

Finally, *this appeal is taken under the authority of the very act in question.* Is it not more congruous to hold that the time and the conditions are governed by the *same* act, than it is to strain language in order to have the time governed by an old law which it seems more consistent to say was superseded by the act in question?

Appellants suggest that they used some of their time in an appeal to the Circuit Court of Appeals, and

for this reason should be excused for their delay. That they frittered away their time in abortive appeal proceedings before a Court which had no jurisdiction of the subject seems scarcely an excuse. They are under no legal disabilities, while they had numerous counsel (including the Attorney-General), and ample means: They are in no position to ask an advantage because of their own mistakes.

The question presented seems quite clear and simple, and a very elaborate or highly finished presentation can, perhaps, be dispensed with.

It appears, over and over again, that it was in the mind of the legislators, in passing the act in question, to establish a *system* of appeals, not for Circuit Courts of Appeals alone, but for *all* United States Courts. If the act is thought to be in any sense ambiguous, it would seem that the evident intention of the legislators should govern in construing it.

Chester Bradford

Alonzo Greene Smith